# Central Law Journal.

ST. LOUIS, MO., JULY 14, 1893.

Our readers will find a considerable portion of this issue taken up by our antagonists, so to speak. It will be recalled that editorial comments, some time ago, upon the case of Field v. Small, decided by the Supreme Court of Colorado, involving the question as to the signature of the vendee to a contract for the sale of real estate under the Statute of Frauds, elicited considerable vigorous criticism on the part of a subscriber whose learning and evident study of the subject gave his opinion much weight. (See 36 Cent. L. J. 49, 109, 329, 340.) We are pleased to present his view more at length in the shape of a leading article on page 24, which, to say the least, is very plausible and quite worthy of attention. By way of reinforcement, which many will doubtless think he is not much in need of, we also print on page 31, letters from two correspondents on the same subject, who also ably argue against our position. We are free to say that whether on this question or any other, we are right or wrong, we cheerfully accord to those who differ a chance to be heard, being fully conscious that our opinion is far from infallible and deeming that it is the province and duty of a law newspaper to shed all possible light upon controverted questions of law. We may hereafter take occasion to add something to this interesting controversy.

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The past few weeks has been exceedingly prolific of decisions involving new and interesting constitutional questions. The one most worthy of attention is probably that by the United States Circuit Court of South Carolina in the case of Cantini v. Tilllman, upholding the constitutionality of a statute of that State, by which it assumed the exclusive right to purchase and sell intoxicating liquor. The most salient features of this act are the appointment of a commissioner "who shall purchase all intoxicating liquors for lawful sale in this State, giving preferences to manufacturers and brewers doing business in this State, and furnish the same" in sealed packages to certain officers, to be appointed and known as "county dispensers," who shall sell by the package only, the purchaser not being allowed to open a package on the premises. The court held that there is no inherent right of a private citizen to sell intoxicating liquors by retail and that the statute in its general scope and purpose is within the police power. The *New York Law Journal*, in the course of a review of this case, very properly says that "although there be no inherent right to retail liquors, and although, in the exercise of the police power it be constitutional even to prohibit their sale altogether, and whether or not this statute be ultimately held not to be unconstitutional on any ground, it marks a decided advance in the socialistic tendency of government for a State to assume to take charge of and conduct the retail liquor traffic."

Another decision is that of *Ex parte* Whitwell by the Supreme Court of California. There an ordinance of a board of supervisors regulating the business of keeping asylums for the care of persons afflicted with insanity, inebriety or other nervous diseases, provides that the board shall not grant a license to any person to conduct such business unless the walls of the asylum designated in his application are rendered fireproof by being constructed of brick and iron, or stone and iron, and the grounds accessible to patients are surrounded by a brick wall at least eighteen inches thick and twelve feet high, and the premises are distant more than four hundred yards from any dwelling-house or schoolhouse. Another section provides that no license issued by the board shall authorize male and female patients to be cared for in the same building. It was held, with reason, that these sections are unconstitutional and void, being an arbitrary exercise of the police power.

Very much to the same point is the case of *In re* Garrabad, decided by the Supreme Court of Wisconsin. In that case it appeared that an ordinance of the city of Portgage makes it unlawful for any person or organization to march on certain streets shouting, singing, or beating drums or tambourines, or playing upon any instrument, without having first obtained the written consent of the mayor, but provides that the ordinance shall not apply to fire companies, or the State militia, and that permission shall not be refused

any political party that has a regular State organization. It was held, that the ordinance was void, since it made unreasonable discriminations, conferred arbitrary power upon the mayor, and denied citizens the equal protection of the laws, in violation of the fourteenth amendment to the federal constitution.

Substantially in line with these cases is that of the General Term of the Court of Common Pleas of New York in Health Department v. Rector of Trinity Church. It was there held that a provision of the consolidation act that all tenement houses shall be provided with a supply of Croton water at one or more places on each floor whenever the owner shall be so directed by the Board of Health, under penalty of fine and imprisonment, is unconstitutional. The point was taken and forcibly argued by Judge Pryor, in the opinion of the court, that such statute could not be considered a legitimate exercise of the police power in a case where the evidence shows that the premises affected are already supplied with water easily accessible; that the absence of water on the upper floors is not prejudicial to health, and that the only effect of conducting water to the upper floors would be to create a convenience for the tenants.

Another decision and one as to the correctness of which we entertain considerable doubt is the case of State v. Lewis, by the Supreme Court of Indiana, wherein they hold that a statute of that State making it a misdemeanor for any one to have in his possession a gill, net or seine, except in certain cases, which are particularly specified, and prescribing the penalty therefor, is a constitutional exercise of police power. The effect of this law is, as is well stated by the editor of the publication heretofore referred to, "to make criminality depend entirely upon a subjective condition of the owner of the net—his mere intent in possessing something without proof of any overt act."

## NOTES OF RECENT DECISIONS.

SALE—PAYMENT UNDER DURESS — PAROL EVIDENCE—WRITTEN CONTRACT.—The United States Supreme Court in Lonergan v. Buford, 13 S. C. Rep. 684, held that in a suit on a written contract to sell all defendant's cattle on certain ranches, except two thousand head of steers already sold to another purchaser, written and parol evidence of the contract with such other purchaser may be introduced to show that it called for steers two years old and upward, and therefore that the contract in dispute called for all steers on such ranches under that act, and that the purchaser under the disputed contract could recover for all steers under two years old delivered by the seller to the other purchaser to complete the number of two thousand sold under the prior contract of sale.

It appeared that plaintiff contracted to buy certain cattle and paid $175,500, leaving a balance of $27,000 due. He then discovered that certain yearlings and other property covered by the contract, of the value of $14,110, had been delivered to other parties. Plaintiff could not get possession without completing the stipulated payment, and unless he took possession the property would be at great risk of loss for want of care during the winter just then beginning. It was held that his payment of the balance under protest was extorted by duress, and that he could maintain a suit to recover the value of the property wrongfully delivered to others.

CITIZENSHIP—MARRIED WOMAN.—The question was recently considered by Judge Billings, of the United States Circuit Court at New Orleans in the case Comitis v. Parkerson, whether a woman who was a citizen of the United States, and never intended to leave it, became expatriated and became an alien by marriage with a man who had been a subject of Italy, but who previous to his marriage had settled in Louisiana and had forever severed himself from Italy. Judge Billings, decided the question in the negative. He said that his conclusion, based on the utterances of the public writers of the supreme court and the provisions of the treaties, was that even if congress meant to imply that expatriation from the United States might be effected by means other than naturalization in a foreign country, it must have meant that it should be conditioned upon actual departure from the country, adding: "It does not affect the conclusion that the domicile of the wife was controlled by that of the husband. Whether decided by her or by some one whom she had authorized to decide for her, the fact of her residence here, with the purpose

on the part of her husband and herself to remain here always, is, as it seems to me both upon principle and authority, an insuperable obstacle in the way of her ceasing to be considered a citizen of the United States."

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FILING PETITION AND BOND.—In North American Loan and Trust Co. v. Colonial & U. S. Mortgage Co., 54 N. W. Rep. 659, the Supreme Court of South Dakota considers some interesting questions in regard to the application of the Removal of Causes Act. It is held that the Act of Congress of March 3, 1887, gives to a defendant the absolute right of removal from the State to the federal court, if there exist the required conditions as to diverse citizenship and amount in controversy, and that in an action so removable, the filing of a sufficient petition and bond in the office of the clerk of the court in which such action is pending, with, and as a part of, the records of the case, is a filing of the same "in such suit in such State court," within the meaning of section 3 of said act. Such petition and bond, so filed within the time prescribed by said section 3, *ipso facto* arrests the authority of the State court to proceed further in the case. Actual presentation to the State court, if in session, is a courtesy due to the court, but it is not expressly required by the law; and, where there will be no session of the court to which the petition could be formally presented within the time when the defendant must answer, the claim of courtesy to such court cannot be allowed to defeat the defendant's right of removal. In this case the defendant, a non-resident corporation, before its time to answer had expired, filed its petition and bond in the office of the clerk of the court in which the action was pending, as a part of the records of the case, the court not being in session. Afterwards, and with actual knowledge of such facts, no term having yet been held, the plaintiff procured to be entered a judgment against the defendant as upon its default. It was held that such judgment was rendered by the State court without jurisdiction, and it was error to refuse defendant's application to set it aside. Corson, J., dissented.

LABOR ORGANIZATION — PROCURING DISCHARGE OF NON-UNION LABORER—BOYCOTT.—In the recent case of Lucke v. Clothing Cutters' & Trimmers' Assembly, 26 Atl. Rep. 505, decided by the Maryland Court of Appeals, it was held that a labor organization which refuses to admit a non-union man to membership and informs his employers that in case he is any longer retained it will be compelled to notify all labor organizations of the city that their house is a non-union one, and thereby compels his discharge, is guilty of a wrongful act; that an action will lie against it by the non-union man for the damages he has suffered in consequence of such discharge; that such conduct is not warranted by a statute which authorizes the formation of trades' unions to promote the well-being of the every-day life of members, and for mutual assistance in securing the most favorable conditions for such members, and that where the work of the non-union man was entirely satisfactory to his employers, who intended to retain him permanently, and he was discharged solely because of the notice received from the labor organization, the fact that his employer reserved the right to discharge him at the end of any week would not prevent him from recovering damages from the organization for maliciously and wantonly procuring his discharge. The court in rendering judgment said: "When the State granted its generous sanction to the formation of corporations of the character of the appellee it certainly did not mean that such promotion was to be secured by making war upon the non-union laboring man, or by any illegal interference with his rights and privileges. The powers with which this class of corporations are clothed are of a peculiar character, and should be used with prudence, moderation and wisdom, so that labor in its organized form shall not become an instrument of wrong and injustice to those who, in the same avenue of life and sometimes under less favored circumstances, are striving to provide the means by which they can maintain themselves and their families. It is essential to good government and the peace of society that correct legal principles be applied in the consideration of all questions, for it is undeniably true that wrong principles cannot and never do produce salutary remedies."

INTOXICATING LIQUOR — CIVIL DAMAGE SUIT.—In Myer v. Butterbrodt, 34 N. E. Rep. 152, decided by the Supreme Court of Illinois, it was held that evidence that a man

who, when sober, was an expert swimmer, went into a river while drunk, and was drowned; that upon such occasion he swam awkwardly and with difficulty, and vomited shortly before he sank—is sufficient to uphold a finding that his death was caused by intoxication, in an action under the "Civil Damage" act, against the person who sold or gave intoxicating liquor to deceased. The court said, *inter alia:*

That the defendant on the day alleged did sell or give the husband of plaintiff intoxicating liquors, and that by reason thereof he became intoxicated, and that, being so intoxicated, he went from defendant's saloon to the river, and into it, and was there drowned, is not denied. The point of controversy upon the trial and in the appellate court was as to whether the drowning was caused by the intoxication. That the evidence introduced by the plaintiff below tended to prove that it was in consequence of his intoxicated condition that the deceased went into the river at the place, and under the circumstances, that he did, must be conceded. Neither can it be denied that the evidence tended to prove, if it did not fully establish, the fact that his being drowned was the result of his intoxication. It was proved that when sober he was an expert swimmer, whereas on the occasion of his death, he swam awkardly, and with apparent difficulty—his head, several times before he sank, being under the water—and that he vomited shortly before he finally went down. In other words, the evidence introduced on the trial at least tended to support the allegations of the declaration, not only as to the selling or giving of intoxicating liquors, and that intoxication resulted therefrom, but also that death was caused by such intoxication. The most that can be said is that as to this last fact the evidence was conflicting. That being so, the judgment of the appellate court, affirming that of the circuit court, conclusively settles that, and all other controverted facts, against appellant. This conclusion so clearly resulting from section 89 of the Practice Act, and so repeatedly held by the decisions of this court, seems to have been overlooked by counsel for appellant, in his argument, or else he has failed to distinguish between matters of law and mixed questions of law and fact.

The first point is that the alleged intoxication was not the proximate cause of the death of the husband of appellee. Whether an act is the proximate cause of an injury is a question for the jury upon the evidence, under appropriate instructions. It is, in other words, a mixed question of law and fact, which must be submitted to the jury under proper instructions from the court. Car Co. v. Blunm, 109 Ill. 20; Bagley v. Grand Lodge A. O. U. W., 131 Ill. 498, 22 N. E. Rep. 489. And the finding of the appellate court as to mixed questions of law and fact is final, and not subject to review in this court. St. Louis Nat. Stock Yards v. Wiggins Ferry Co., 102 Ill. 514. Unless, therefore, there was some error in the instructions of the court upon the question as to whether the intoxication was the proximate cause of the death of the deceased, the finding of the jury and judgment of the apppellate court are as conclusive against the appellant on that as any other fact in the case. There is certainly nothing shown by the facts and circumstances under which the deceased lost his life inconsistent, as a matter of law, with the conclusion that it was the proximate result of his intoxication. Had he fallen into the stream, and been drowned, or gone upon a railroad track, and been run over by a locomotive, by reason of being incapable of exercising proper caution, or taking proper care of himself, it would be clear, under the decisions of this court, that his death was the proximate result of his intoxication. Emory v. Addis, 71 Ill. 273; Brannan v. Adams, 76 Ill. 331; Schroder v. Crawford. 94 Ill. 357; Black, Intox. Liq. section 311.

## SIGNATURE OF PURCHASER TO CONTRACT FOR SALE OF LAND UNDER STATUTE OF FRAUDS.

With due deference I insist upon the construction of the statute of frauds, urged in my recent communication, and controverted in your editorials on pages 49 and 109, of Vol. 36; that is, that the expression "party to be charged," applies as well to the vendee as to the vendor of real estate, and that an executory contract for the purchase and sale of real estate, signed only by the vendor, is not binding upon the vendee, except in the well recognized instances of fraud, part performance, etc.; and that no court, reputable or otherwise, has ever held to the contrary; and that therefore the Colorado court hardly deserved the editorial censure administered on page 49 of the same volume. This principle is so elementary, and so well settled, that it is difficult to seriously argue it, and I should make no further reference to the subject, but for the mischief likely to result from such an error in so influential, and usually so accurate, a publication as the CENTRAL LAW JOURNAL.

An examination of any standard text book on the subject, English or American, will show the universal doctrine to be that the vendee of real estate, who has not signed such a writing as the statute requires of the "party to be charged," cannot be held to the contract.[1] The point was expressly ruled in Hawkins v. Holmes,[2] and has not since been controverted. The American cases on the subject are too numerous to

[1] See for example: 1 Sugden on Vendors, 190, 241, 242, 246; Waterman on Spec. Perf., 239 *et seq.*; Fry on Spec. Perf., 497; 1 Waverlle on Vend., 99, 170 *et seq.*; 8 Am. & Eng. Enc. Law, Title, "Frauds, Stat. of;" 2 Minor's Inst. (2d ed.) 769 *et seq.*; Pomeroy on Spec. Perf., 75, 76, *et seq.*

[2] 1 P. Wms. 770. See also Seton v. Slade, 7 Ves. 265, and Mr. Sumner's notes. Chief Justice Marshall so held in Hughes v. Moore, 7 Cr. 176.

attempt to cite, and too unanimous to need citation. Recent illustrations, precisely in point, are found in the cases cited below.[3] The case of Clayson v. Bailey,[4] so far from sustaining the doctrine for which it is cited in the editorial in question, is, curiously enough, an express authority to the contrary, and is cited very generally as one of the leading cases in support of the contrary doctrine. The contract in that case did not concern real estate, but Chancellor Kent took occasion to review the whole subject, and reached the conclusion that although, by reason of the statute, a contract concerning real estate could not be enforced against either of the parties who had not signed it, yet it would be enforced against the other who had signed. He uses this language (near bottom page 489): "I have thought, and often intimated, that the weight of argument was in favor of the construction that the agreements concerning lands, to be enforced in equity, should be mutually binding; and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. It appears to be settled that though the plaintiff has signed the agreement, he can never enforce it against the party who has not signed it." The learned chancellor then proceeds to show that while the language of the statute is slightly different in respect to lands, and in respect to goods and chattels, yet the effect is the same, and that in either case, the party to be charged (whether vendor or vendee) must have signed the contract. In a few of the States, the memorandum is required to be signed only by the "party selling" or by the "vendor." The courts of these States hold, very properly, that a verbal acceptance by the vendee is sufficient, inasmuch as the statute excludes the necessity for his signature, and leaves him where he was at common law. This seems to be the case at present in Pennsylvania, New York, and some of the northwestern States. In these States the courts say the statute was made (as you assert) only for the protection of owners and real estate. And this may explain the source of the error into which you have fallen. You evidently have in mind these exceptional cases, while the doctrine laid down by the Colorado court, is that generally prevailing both in England and America. And it is only in those States whose statutes use the exceptional phrases "party selling," or "vendor," instead of "party to be charged," that we find any intimation by the courts that the statute was intended only for the protection of owners of real estate. This distinction is pointed out and commented upon in 8 Am. & Eng. Enc. Law, Title "Frauds, Stat. of," and Pomeroy on Spec. Perf. Sec. 76 and notes. The principle that the non-signing vendee is not bound where the contract is required to be signed by the "party to be charged," is never questioned. The chief difficulty which confronted the courts in earlier times, in dealing with such a contract, when sought to be enforced by the non-signing vendee, arose out of his conceded freedom from liability, and the apparent lack of mutuality thus presented. But it has long since been settled that the lack of mutuality in such case is apparent only; and that when the vendee affirms the contract in his bill brought for specific execution, the objection is removed. This is fully and ably discussed in the case of The Old Colony R. R. Co. v. Evans,[5] and also in Ives v. Hazard.[6] If it were true that the vendor's signature were alone sufficient, why all this discussion in the books as to the lack of mutuality when the non-signing vendee asks for specific performance? Or why, in any case, the inquiry as to whether there is a sufficient signing by the vendee? For example, in Ogilvie v. Foljambe,[7] the chief question involved was whether there were such a signing by the vendee as to bind him. In the contrary view no signing by the vendee was necessary, and there was no need for the court to trouble itself with that question. It must be admitted that the expression "party to be charged," as used in the statute, with respect to sales of goods and chattels, means the defendant, whether buyer or seller. Must not the same expression, used in the same statute, with respect to sales of real estate, be given the same meaning? Can it be contended that in the one case, the statute means what it says, viz: "the party to be charged" (*i. e.*,

[3] Guthrie v. Anderson (Kas.), 28 Pac. Rep. 164; Greenless v. Roche (Kas.), 29 *Ib.* 590; Wyckoff v. Mickie (N. J.), 20 Atl. Rep. 214.

[4] 14 Johns. 484.

[5] 6 Gray, 25, s. c., 66 Am. Dec. 393.

[6] 4 R. I. 14, s. c., 67 Am. Dec. 500.

[7] 3 Merivale's Rep. 53.

necessarily and *ex vi termini*, the defendant, whether buyer or seller), and in the other, it does not mean what it says, but that the identical expression means "seller" only? If the statute meant "seller," why not have said so? Why have used [the [longer and more equivocal phrase? If the statute was adopted for the protection of owners of real estate only, and the expression "party to be charged" means seller only, why has so much learning been exhausted by the courts in determining whether, and when, the auctioneer may bind the vendee of real estate, by signing the memorandum, since the bidder is already bound without such signing? This question arose in Virginia, and the court delivered an elaborate opinion, holding that a vendee of real estate was not bound by the contract, because the memorandum was signed by the auctioneer the day after the sale. There was no question as to the fact of the verbal agreement.[8] In McComb v. Wright,[9] Chancellor Kent uses the following language: "It appears now to be settled that the auctioneer is a competent agent to sign for the purchaser, whether a sale of lands or goods, at auction, and the insertion of his name as highest bidder, in the memorandum by the auctioneer, immediately on receiving his bid, and striking down the hammer, is a signing within the statute as to the purchaser."

In support of this position he cites many cases, English and American, and in all of them the signing of the memorandum of the terms, and the name of the purchaser, is prominently mentioned as absolutely necessary to bind the latter under the statute. Judge Story, in Smith v. Arnold,[10] uses similar language, and to the same effect in Judge Shaw's opinion in Gills v. Bicknell.[11] If the requirement of the statute had been complied with when the verbal bid of the vendee has been accepted, and the memorandum signed by the vendor, the questionings of these learned courts as to the vendee's signature were wholly vain. As already stated, it is conspicuous that the inquiry in most of the cases has been, not as to the principle of law. Is the vendee's signature necessary to bind him?—but as to the fact: Has he signed? If so, he is bound. If not, he is not bound. Or again: Not having signed, does his conceded non-liability affect his right to compel the signing vendor to specifically perform? And the courts are practically unanimous, that although not bound himself, he may yet enforce the contract against the vendor, who, having signed, cannot plead the protection afforded by the statute.[12]

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[8] Walker v. Herring, 21 Grat. 678.
[9] 4 Johns. Ch. R. 659.
[10] 5 Mason's C. C. R. 414.
[11] 2 Cush. 355.

[12] Since the foregoing was written, the court of appeals of Virginia has declared the following instruction propounded by the lower court, as correctly stating the law: "The court instructs the jury that no contract for the purchase of land is binding on the purchaser, unless it is in writing and signed by the purchaser or his agent; and if the jury believe that the plaintiff did not sign a contract in writing for the purchase of the land, . . . there was no valid purchase by the plaintiff, and she is entitled to recover from the defendant anything paid him on account of the said purchase." Brown v. Pollard, 17 S. E. Rep. 6; citing, amongst other cases, Scott v. Bush, 26 Mich. 418.

## LAW PARTNERSHIP—ACCOUNTING—ACTING AS EXECUTOR.

### METCALFE V. BRADSHAW.

*Supreme Court of Illinois, April 4, 1893.*

Complainant and defendant formed a partnership "for the purpose of practicing the law," and agreed to give their "time and talents and strength to the prosecution of the interest of the firm." During the partnership the defendant acted as executor of several estates, with the consent of complainant, and it did not appear that he neglected in any way his duties to the firm. Held, that the commissions received by him as executor did not belong to the firm, since acting as executor does not pertain to the practice of law.

BAILEY, C. J. This was a bill in chancery, brought by Andrew W. Metcalfe against William P. Bradshaw, for an accounting. On the 26th day of August, 1874, the complainant and defendant formed a copartnership for the practice of the law, and for that purpose executed the following copartnership articles: "Articles of agreement signed and agreed upon between Andrew W. Metcalfe and Wm. P. Bradshaw this 26th day of August, A. D. 1874. (1) Reposing in each other mutual confidence and trust, do hereby associate ourselves together for the purpose of practicing the law; firm to be known by the name of Metcalfe and Bradshaw, and to continue for five years from this date, unless sooner dissolved by mutual consent. (2) Terms: First year, said Metcalfe to take two-thirds, and said Bradshaw one-third; second year, said Metcalfe to take three-fifths, and said Bradshaw two-fifths,—of the receipts of said firm; and, from the end of the second year until the dissolution of said partnership, each to share equally in the receipts of said firm. (3) The expenses of said office and firm to be paid by each partner in

proportion to his share of the receipts of the firm. (4) We, and each of us, pledge ourselves to each other not to become a candidate for any political office, so as to become involved in politics, during the continuance of said firm, unless by mutual consent. (5) We, and each of us, do promise and agree to give our time, our talents, and our strength to the prosecution of the interest of the firm. (6) Any omission to keep and observe the promises and agreements herein named and agreed upon, by either of the parties hereto, will justify the other in a dissolution of the partnership. (7) An account is to be taken between the parties hereto at the end of each six months, if either party shall so desire it. This agreement shall not prevent the parties hereto from adopting any rules for the control and government of the office. Witness of names: A. W. Metcalfe. Wm. P. Bradshaw." The copartnership thus formed continued until December 15, 1885, when it was dissolved. The bill, which was filed October 8, 1889, alleges the formation of the copartnership, and sets forth the copartnership articles *in extenso*, and alleges the dissolution of the firm, by mutual consent, December 15, 1885, and also that, during its continuance, business to a large amount was done by the firm, for various parties, on credit, and that the business still remains unsettled; that no settlement has ever been made between the copartners; that since the dissolution the complainant has well hoped that the defendant would adjust and settle the partnership accounts, and has frequently applied to him for that purpose, but that the defendant has declined so to do; that the defendant has collected a large amount, due and owing to the firm under the copartnership articles, of moneys earned by members of the firm, and belonging thereto, and has failed to enter the same in the partnership books of account, and wholly refuses to render to the complainant an account thereof; that, upon a full and true statement of the accounts of the firm business, it will appear that there is a large balance due from the defendant to the complainant in respect thereto.

The defendant's answer admits the formation of the partnership, the execution of the copartnership articles, and the dissolution, as alleged, and that no actual settlement, by an account taken, was then had; the parties agreeing, by a tacit understanding, to a dissolution as matters then stood, pecuniarily; defendant then believing that an account stated would show a balance largely in his favor, but being willing, for the sake of peace and a dissolution, to consider that each had received what he was entitled to under the articles. The answer admits that many debts were due the firm at the time of the dissolution, and alleges that the defendant expects to share in such outstanding debts, but that the complainant carried off, and retains, all evidence of such indebtedness, and has collected much of it. It denies that the defendant has collected any part of the outstanding indebtedness, or received any portion of that collected by the complainant that the complainant, since the dissolution, had ever called for a settlement, or pretended that the defendant was indebted to him on account of copartnership matters, until shortly before the bill was filed, when he spoke about it for the first time; that the only claim then set up by him was that the defendant, during the partnership, had, as executor of the wills of Charles R. Bennett and John Neudecker, received commissions, and, although not legally liable therefor to the complainant, yet, as such commissions were received during the existence of the partnership, the defendant ought to share them with the complainant.

A replication was filed, and the parties thereupon entered into and filed the following stipulation: "It is stipulated and agreed by and between counsel that the matters contended for by the complainant in this case are limited to the commissions involved in three certain cases, namely, Charles R. Bennett's Estate, Theodore Emmett's Estate and John Neudecker's Estate, with the understanding that everything outside of these estates, in the partnership, has been settled by and between them." The cause was then heard upon pleadings and proofs and the stipulation, and the court found that the commissions received by the defendants from those estates were not, and were not by the parties considered and treated as profits of or belonging to the firm, and that the complainant was not entitled to have an account thereof from the defendant. A decree was thereupon entered dismissing the bill, at the complainant's costs, for want of equity. On appeal by the complainant to the appellate court the decree was affirmed, and the present appeal is from the judgment of affirmance.

It appears that on the 25th day of May, 1878, the defendant was appointed one of two joint executors of the last will and testament of Charles R. Bennett, deceased, and served in that capacity until September 17, 1881, when the estate was settled. The evidence tends to show that the commissions to which he became entitled as executor, and which he received, amounted to $784.42. During the progress of the administration the complainant was employed by the executors to render certain legal services, for which, according to the testimony of the defendant, he was paid for his individual use, and not as a part of the earnings of the partnership, the sum of $600. The complainant, on the other hand, testifies that he in fact received nothing for his legal services, and that whatever he did was a part of the law business of the firm, and was done in firm account. It seems, however, that he made no charges for his services on the firm books, and gave no credit on the books for the money received by him, if he in fact received any. So far as the testimony of these witnesses is at variance, all we need say is that the court saw them, and heard them testify, and from all the evidence found the equities of the case to be with the de

fendant. That finding, so far as we can see, is entitled to the credit which is ordinarily given to the finding of a court of chancery, where the evidence is given orally in open court, and on appeal it must be accepted as conclusive unless it clearly appears to be against the weight of the evidence. There is nothing in the record from which we can say that such is the case here, and we must therefore assume, not only that the issues of fact thus raised by the witnesses in their testimony, so far as they have any bearing upon the correctness of the decree, were found by the court in favor of the defendant, but also that such finding, for all the purposes of this appeal, must be accepted as the true one. On the 5th day of June, 1882, the defendant was appointed administrator of the estate of William T. Emmett, deceased, and continued to act as such administrator until June 4, 1887, when the estate was settled, and he was discharged. The complainant was also employed by him to render legal services for that estate, and both agree that for such services the complainant received the sum of $125. There is the same disagreement between them, however, as to whether this sum was paid him for his individual use, or as a part of the earnings of the firm. The commissions to which the defendant became entitled as administrator of that estate seem to have been something over $500, but he testifies—and in this he does not seem to be contradicted—that having paid a portion of the claim against the estate in full, in ignorance of the existence of a claim that was afterwards presented, and which more than exhausted the remaining assets in his hands, he was compelled to use the money due him for commissions, and more, to make good to the new claimant what he had paid to other creditors, and that he therefore, in fact, retained nothing on accouut of commissions. On the 12th day of September, 1883, the defendant was appointed executor of the last will and testament of John Neudecker, deceased. The Neudecker estate was large, and consisted principally of personal property. The administration involved no controversies, and was conducted without litigation; the bulk of the assets, consisting of moneys and securities, being distributed within two months of the date of the appointment of the executor. This estate was finally settled December 21, 1885,—six days after the dissolution of the partnership between the complainant and defendant. The commissions received by the defendant, according to his own testimony, were a little less than $6,000.

Whether the administration of these estates is to be regarded as firm business, and the commissions received by the defendant therefor as a part of the proceeds or earnings of the business, must depend chiefly, if not wholly, upon the construction to be placed upon the partnership articles. By those articles the complainants and defendant associated themselves together "for the purpose of practicing law," and they mutually promised to give their time, talents, and strength "to the prosecution of the interest of the "firm." Each pledged himself not to become a candidate for any political office, so as to become involved in politics, during the continuance of the firm, except by mutual consent; and it was agreed that any omission to keep and observe these promises and agreements by either party should justify the other in dissolving the partnership. We think it too plain for argument that accepting an appointment as executor or administrator of a deceased person, and acting as such, does not, as the term is ordinarily understood, pertain to the practice of the law. Persons accepting and performing the duties of trusts of that character need not be lawyers, and, as is well known, those who are appointed as executors or administrators are, in the great majority of cases, men who do not belong to the profession. Their duties are usually of a business, rather than of a professional, character. True, the administration of estates frequently requires legal advice, and often involves more or less of litigation, but substantially the same may be said of all other business pursuits, and especially of all positions involving the execution of trusts. But men are ordinarily appointed to execute trusts because of the confidence the donor of the trust has in the honor, integrity, and business capacity of the appointee, rather than because of his knowledge of legal principles, or his ability to carry on litigation with success. At all events, the execution of trusts is not, and never has been, regarded as a part of the duties peculiarly pertaining to the legal profession, or as constituting a part of what is ordinarily understood as "the practice of the law." It cannot, therefore, with any propriety, be claimed that the business transacted by the defendant in his trust capacity, as executor or administrator of the estate in question, was a part of the firm business, within the contemplation of the copartnership articles, or that the commissions realized by him from the execution of such trust constituted a part of the earnings or profits of the firm.

It seems to be admitted that, although the copartnership was continued for several years after the expiration of the term fixed by the articles, no new articles were adopted, and no new arrangement was made; and it therefore follows, as a legal conclusion, that it was continued as a partnership at will, but subject in all respects, except as to the right of either partner to terminate it at pleasure, to the terms of the copartnership articles. If there had been an agreement, either express, or to be implied from the circumstances, that the commissions, to be received by the defendant for his services as executor or administrator should be regarded and treated as partnership earnings, a different result would probably follow. But, upon a careful examination of the record, we are unable to find that such agreement is established by either direct or circumstantial evidence. The fair conclusion from all the evidence is that the defendant accepted and executed these trusts

without objection, and even with the express approval of the complainant, but without any agreement or understanding, express or implied, that the compensation to be received by him should be turned over to the firm, as firm profits.

We are not unmindful of the well-settled rule, that a partner will not ordinarily be permitted, for his own profit, to enter into business in competition with his firm. Thus, he cannot, without the consent of his copartner, embark in a business that will manifestly conflict with the interests of his firm. Nor can he clandestinely use the partnership property or funds in speculations for his own private advantage, without being required to account to his copartners for the property and funds thus used. And for the profits. The general rule being that each partner shall devote his time, labor, and skill for the benefit of the firm, he cannot purchase for his own use, and for the purpose of private speculation and profit, articles in which the firm deals, and, if he does so, the profits arising therefrom may be claimed by the copartners as belonging to the firm. 5 Wait, Act. & Def. 125. Thus, as said in 1 Bates, Partn. § 306: "If a partner speculate with the firm funds or credit he must account to his copartners for the profits, and bear the whole losses of such unauthorized adventures himself; and if he go into competing business, depriving the firm of the skill, time, and diligence or fidelity he owes to it, so he must account to the firm for the profits made in it. And a managing partner will be enjoined from carrying on the same business for his own benefit." But the same author says, a little further on, that a partner may traffic outside of the scope of the business for his own benefit. So, also, in Lindl. Partn. 312, the rule is laid down as follows: "Where a partner carries on a business not connecting with or competing with that of the firm, his partners have no right to the profits he thereby makes, even if he has agreed not to carry on any separate business."

Applying these principles to the case before us, we see no ground for sustaining the complainant's bill. The defendant, by becoming executor or administrator, engaged in no business or enterprise which can be regarded as in any sense in competition with his firm, or which involved the use, for his own advantage, of anything belonging to the firm. True, by the copartnership articles, he agreed to give his time, talents, and strength to the prosecution of the firm business; but it does not appear that he failed, by reason of the acceptance of those trusts, in the performance of his agreement in that respect. It is not shown that any firm business suffered for lack of attention on his part by reason of his performance of the duties of executor or administrator. Nor did he accept either of these trusts clandestinely, or without the consent of approval of his copartner. As to the Neudecker executorship, the complainant takes pains to prove that the will of Neudecker was drafted by himself, and that the defendant was named therein as executor at his suggestion, and as the result of some importunity on his part, and that he subsequently became the defendant's surety on the bond given by him as executor. The complainant's consent to the defendant's acceptance of the trust could not be more clearly shown. It cannot be seen how the acceptance of these trusts, under the circumstances thus appearing, was in any sense a fraud on the partnership, or in contravention of the defendant's duties as partner, so as to call for an application of the rules arising in such cases, as stated above. In view of all the evidence, we are disposed to hold that the only proper result is the one reached by the circuit court in its decree, and the judgment of the appellate court, affirming the decree, will be affirmed.

NOTE.—Inasmuch as it is a matter of almost daily occurrence for some members of a law firm to be selected as arbitrator, executor, guardian, receiver, trustee, etc., the questions suggested by this case are of special interest to the legal profession. From the very nature of the confidential, intimate relation sustained by each partner toward all his fellows, it necessarily follows that (like all other trustees) he cannot embark in any competitory, rival, or repugnant enterprise.

The familiar rules of law bearing on this question are well nigh axiomatical in their very nature. Even the most cursory examination of reported cases will show that the practical difficulty is to learn the real facts, in each particular case. When once the material facts are judiciously ascertained and determined, the appropriate rules of law are few in number and extremely simple in their application; but the settlement of those facts is often a matter of no little difficulty. For example: It appears in the presen case that while B was receiving and converting money, as executorial commissions, his partner was, at the same time and from the same source, receiving and converting money, as legal advisor of the estate. As a matter of law the conclusion is that—"it cannot be claimed that the business transacted by the defendant as executor was a part of the firm business (within the contemplation of the copartnership articles), or that the commissions realized by him constituted part of the earnings of the firm. . . . If there had been any agreement that the commissions should be treated as partnership earnings, a different result would probably follow." But, as a matter of fact, no such agreement is shown; on the other hand, it is shown that defendant accepted these executorships with the full knowledge and consent of his law partner.

It will be observed that the matters from which this suit arose occurred after the copartnership agreement had expired by its own limitation; occurred while the connection was being continued as a mere partnership at will, liable to be terminated at any moment, by either party, and without notice to the other. This loose, slipshod arrangement was continued during six years, yet is really all the court had to go upon in adjudicating the controversy which subsequently arose between the partners thus lightly yoked together. On making up a sort of equitable "general average," it is concluded that M presents no substantial equity as against B; but in this, as in nearly all other reported cases, the substantial, vital question is: "Was there, or was there not, a subsisting partnership agreement; and, if so, what were its precise terms? In considering the question o partnership or no partnership, two cases recently de

cided by the United States Supreme Court will be found highly instructive. In the first case, the plaintiffs, a trading partnership of three members, engaged in business at Minneapolis, effected insurance with defendant, a foreign corporation. The policy contained a special covenant, in these words: "This policy shall be void if the insured property be sold or transferred, or any change takes place in title or possession (except by succession, by reason of death of the insured) whether by legal process, or judicial decree, or voluntary transfer or conveyance." In a suit brought to recover the amount of this policy, defendant sought to escape payment upon the single ground that after delivery of the policy and before the goods were burned, a new partner had been admitted to the firm, and without the insurer's consent or knowledge. Investigation showed that, during that period, the plaintiff firm had actually received from one Arndt the sum of $10,000, upon an agreement that he should join them in business; but the court construed this agreement not as creating a present partnership, by which Arndt acquired any title to the firm's assets, but rather as an agreement whereby the existing partnership should, at a later day be changed into a corporation, of which Arndt should be a member. It being urged by the defendant as highly improbable that any prudent man would risk so large a sum upon the mere naked promise that he should be admitted to membership in a corporation to be created at some uncertain future time, Mr. Justice Harlan, in his usually and caustic and pithy style, answered that, "mere want of business sagacity in such an arrangement, if such there be, cannot control the interpretation of the written agreement between the parties." Drennen v. London Assurance Company, 113 U. S. 51.

This case being twice tried, and removed a second time to the court of last resort, Mr. Justice Harlan stated the rule of law, thus: "Persons cannot be made to assume the relation of partners (as between themselves) when their purpose is that no partnership shall exist.

There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others." Drennen v. London Assurance Company, 116 U. S. 472.

In a still more recent case, L and W were general partners in the banking business, and also as dealers in general merchandise. Both enterprises were conducted at the same time and under the same roof, but were kept separate and distinct. While thus engaged they contracted with H to admit them to partnership with them as to the general store, but not as to the bank. Pursuant to such arrangement the goods were turned over to H as general manager, and all resulting profits and losses were to be apportioned, one-fifth to H, and four-fifths to L and W.

In this condition of affairs the entire stock was attached by creditors of L and W, claiming that the arrangement with H was merely a contract of employment, and not one of partnership. The entire controversy hinged upon the construction to be given to this agreement entered into by and between L, W, and H. In this case, also, the opinion was written by Justice Harlan, who construed their agreement as creating a general partnership; and he cites, approvingly, sections 23-24 of Story on Partnership, thus: "While in the absence of written stipulations, or other evidence showing a different intention, partners will be held to share equally both profits and losses, it is entirely competent for them to determine, as between themselves, the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience, to the common stock. Such matters are entirely in the discretion of parties about to assume the relation of partners." Paul v. Cullum, 132 U. S. 539. It thus appears that, in every case, the real intention of the parties is the one controlling element. That intention, when the agreement has been reduced to writing, is to be wholly determined by considering the precise language which the parties have themselves chosen. The parties are bound not by what they may have honestly supposed that language to mean, but, rather, by the legal meaning which it actually conveys to the court by which it is afterwards construed.

Thus, in the very recent case of Woolworth v. McPherson, 55 Fed. Rep. 528, a copartnership agreement submitted for construction embodied the following ambiguous stipulation: "M to be guarantied $2,000 per annum, to come out of his half of the profits; but should the half of the profits not amount to $2,000 in the year, he shall not be held for any deficiency in the salary account." "In consideration of the guaranty of $2,000 per annum to M, he shall give his entire time, during reasonable business hours, to the business of the firm, and W shall not be held to give the same any more time than he shall chance," etc.

Commenting on this stipulation the court say: "M claims that he supposed the contract guaranteed to him a salary of $2,000 a year, and one-half the profits above that sum, but that he should not be liable, as partner, for any losses in the business. If he was mistaken in his understanding of the effect of the contract it was a mistake of law, for which, under the circumstance, he is not entitled to relief. Hunt v. Rousmaniere's Adm'r, 1 Peters, 1."

As a fair result of all current authorities, it may be said that, so far as the matter is susceptible of being reduced to general rules, the rule laid down in Blain v. Desrosiers, 39 Ill. App. 50, is both salutary and wholesome. This was general assumpsit for money lent, etc.; defendant admitted receiving the money from plaintiff, but insisted that, instead of being a loan, it was a contribution to the capital stock of a partnership then existing between the parties; that such partnership was still subsisting, and therefore plaintiff could not maintain assumpsit, but must resort to equity, for a dissolution, etc.

The evidence being irreconcilable, upon the question of partnership or no partnership, dissolution or no dissolution, the court say the whole matter was properly left to the jury, and that indeed any other course of procedure would have been reversible error.

As tending to show the difficulty of laying down any more precise general rule, the curious reader will find nearly every conceivable phase of partnership agreements exemplified in the following collation of recent American cases: Bank v. Rice, 89 Ala. 1; Romero v. Dalton (Ariz.), 11 Pac. Rep. 863; Haydock v. Williams (Ark.), 16 S. W. Rep. 3; Morgan v. Farrell, 58 Conn. 414; Marrow v. Claud, 77 Ga. 114; Butler v. Merrick, 24 Ill. App. 628; Carter v. Carter, 28 Ill. App. 340; Hyman v. Peters, 30 Ill. App. 134; Kingsbury v. Thorp, 61 Mich, 216; Pulford v. Martin, 62 Mich. 25; Hayes v. Vogel, 14 Daly, 486; Campbell v. Sherman, 8 N. Y. S. 650; Smith v. Lennon, 14 N. Y. S. 259; Wilson v. Bowker, 15 N. Y. S. 293; Barber v. Picotte, 59 Hun, 617; Bank v. Gallaudet, 120 N. Y. 298; Fertilizer Co. v. Reeves, 105 N. C. 283; Clifton v. Howard, 89 Mo. 192; Emersen v. McKenrick (Tex.), 16 S. W. Rep. 419; La. Flex v. Burns, 77 Wis. 538

GEO. C. WORTH.

## CORRESPONDENCE.

### SIGNATURE OF PURCHASER TO CONTRACT FOR SALE OF LAND UNDER STATUTE OF FRAUDS.

*To the Editor of the Central Law Journal:*

Referring to the Colorado case of Field v. Small, and your comments thereon, permit me to call your attention to Wilkinson v. Heavensich, 58 Mich. 574. Ever since that decision the profession in this State have labored under the impression that both parties must sign a contract within the statute of frauds, else neither is bound, in the absence at least of any extraneous consideration. The court seems to consider the opposing authorities "equally respectable." This case holds that Wilkinson was not bound because he did not sign, therefore the parties who did sign were not bound. In view of the case, and those cited, are not your comments a little too severe?

Grand Rapids, Mich. TAGGART & DENNISON.

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*To the Editor of The Central Law Journal:*

Referring to your leaders in 36 Cent. L. J. pp. 49 and 109, I would suggest that the law does not seem to be so universally and definitely settled as your journal would seem to think when it states that, "the term 'party to be charged' does not mean the purchaser;" and that, "it has been held repeatedly and is now elementary law that only the vendor or grantor must under the statute sign the memorandum." For while that seems to be the law in New York, Nebraska, Tennessee, and Wisconsin, in which States it has been held that a sale of land must be signed by the vendor and unless so signed will be of no avail, while if so signed it will be binding upon a vendee who has not signed, provided he has accepted it or assented to it, (Eng. & Amer. Encyc. of Law, Vol. 8, p. 718); yet in this State (Texas), in the case of Crutchfield v. Donathon, 49 Texas, 691, which was a suit by the vendor to enforce a contract for the sale of land signed only by the vendee, it was held by the court that "there can be no question that according to the current of authority the agreement or memorandum thereof required by the statute need not be signed by both parties but only by him who is to be charged by it." And quoting from Addison on Contracts the court says: "If an agreement has been made by word of mouth for the purchase and sale of an estate, and the purchaser signs a memorandum by which he agrees to buy the property for a certain sum from the vendor, and the vendor is ready to establish his title and is willing and offers to convey the property to the purchaser, the latter cannot escape from his agreement to buy, by saying that the vendor has signed no memorandum of the contract and was not himself liable upon it by reason of the statute." And further on the court says: "According to authority, if the instrument sued on were otherwise such a memorandum as the statute required, Donathon (the vendor) was entitled to sue upon it although he himself had not signed it." Smith on Contracts in Lecture II, p. 88, in a discussion of section four of the statute of frauds, says: "The signature is to be that of the party to be charged; and therefore, though both sides of the agreement must appear in the writing, the consideration as well as the promise, it is not necessary that it should be signed by both the parties: it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to charge." And it is laid down in Newby v. Rogers, 40 Indiana, 9, that the words "party to be charged" mean simply "the defendant." In Warvelle on Vendors, Vol. I, p. 100, it is said: "The signature of one party only will be sufficient, provided it be the one against whom enforcement is sought. The end and object of the statute is attained by written proof of the obligation of the defendant in an action to enforce; he is the party to be charged with a liability dependent on and resulting from the evidence, and he is intended to be protected against the dangers of false oral testimony." In De Cordova v. Smith, 9 Texas, 129, the court holds in construing incidentally a contract in which Smith was the grantor or vendor, and one Baker, the grantee or vendee, said contract being signed only by Smith, "Smith is bound by it when it imposes no corresponding obligation on Baker." The point to all this seems to me to be that, barring cases of part performance or other recognized exceptions, in the State of Texas, the vendee defendant is not bound unless he or his authorized agent signs the written memorandum; and this would appear to me to be the general rule except in the States above mentioned, New York, Nebraska, Tennessee, and Wisconsin. I have written thus fully because of the high standing of the CENTRAL LAW JOURNAL and the weight attaching to any opinion authoritatively expressed by it. JOHN CHARLES HARRIS.

Galveston, Tex.

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## BOOK REVIEWS.

BROWNE ON PAROL EVIDENCE.

It is plain to be seen that the author of this work has given the subject much study and reflection. An examination of its pages will demonstrate the truth of the author's assertion that he has been many years in the preparation and that it "has grown up gradually from subsequent practical experience and from the editorial reading and research of the last fourteen years." The fact that no work had yet been written upon this topic and the frequency with which questions as to the admissibility and effect of parol evidence arise in practice, renders this work of especial value to the profession. Without entering into an analysis as to the contents and scope of the book, it will suffice to say that in a clear and concise manner it discusses all the practical questions connected with the subject of the admissibility of parol evidence in respect to written instruments. The text is well arranged and admirably written and the citation of authorities in the foot notes seems to be exhaustive A feature to be commended is the frequent discussion of cases with reference to principles. In other words, it lacks the character of a simple digest of authorities, which so many of our modern text books appear to be. The book is well printed and bound and is published by L. K. Strouse & Co., New York.

BLACK ON TAX TITLES.

At the time of the appearance of the first edition of this work we congratulated its author upon his success in preparing a concise treatise or hand book upon the subject of tax titles which for ordinary use was all that the practitioner would need. In the preparation of the present edition, as we are informed, the whole body of the text and notes has been carefully and thoroughly revised and rewritten, page by page. Four new chapters have been added and more than two hundred new sections. The number of citations has been more than doubled "so that the book now contains an exposition of this doctrine of about forty-

five hundred decisions on the subject of tax titles." It will thus be seen that the author has given us a substantially new book on the subject of which he treats. In arrangement of subjects of the chapters, in the preparation of the text, and in the citation and discussion of authorities the author leaves nothing to be desired. The practitioner interested in the subject of tax titles will find it a valuable work. It is published by the West Publishing Co., St. Paul, Minn.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**



1. ACCORD AND SATISFACTION.—Plaintiff sent a bill of $670 to defendant for medical services, and defendant, while not disputing the services, objected to the amount, and declined to pay the bill rendered, but sent a check for $400, stating that it was to be in full satisfaction of plaintiff's claim. Plaintiff retained the check, but sent another bill for the same amount on which he credited the amount of the check as part payment Defendant at once notified plaintiff that he had sent the check on condition that it should be received in full payment of his bill, and that plaintiff must either keep it on that condition, or immediately return it. Held, that the debt, which was unliquidated, but satisfied by the retention of the check, since its acceptance involved the acceptance of the condition also.—FULLER, v. KEMP, N. Y., 33 N. E. Rep. 1034.

2. ACTION BY ADMINISTRATOR—Death.—Where a note given to one as administrator, for the debt due the estate, is sued by the administrator in his representative capacity, and the administrator dies before the suit is determined, revivor may be had, either by his own administrator, or by an administrator *de monis non* of the original intestate; recovery in either case to be subject to all proper accounts between the two estates. —WOOD V. TOMLIN, Tenn., 22 S. W. Rep. 206.

3. ADMINISTRATION — Foreign Executor.—The proof disclosing that a non-resident or foreign executor had presented and had the will of the testator duly recorded in a court of this State conformably to law, and obtained the appointment of testamentary executor, and qualified as such, such appointee is entitled to exercise the duties of his trust, notwithstanding he has furnished no bond or other security, nor caused an inventory to be commenced within the 10-day limit fixed by law.—SUCCESSION OF WITHERS, La., 12 South. Rep. 875.

4. ADMINISTRATION. — Where the petition of the widow and administratrix of a decedent, to sell lands of the estate for the payment of decedent's debts did not expressly ask for the sale of her interest in the lands described, and her appearance and consent did not expressly designate such interest, a sale under an order of court had in such proceedings will not vest her interest in the lands so sold in her vendee.—IREY V. MATER, Ind., 33 N. E. Rep. 1018.

5. ADVANCEMENT — Evidence.—A son who accepts a conveyance of land from his father, and gives his notes in payment, cannot, after the father's death, escape liability on the notes on the ground that the conveyance was intended as an advancement to him, in the absence of precise evidence, by at least two witnesses, showing such intent.—DOTY V. DOTY, Penn., 26 Atl. Rep. 548.

6. ADVERSE POSSESSION.—Where land has been condemned for a railroad right of way, and the owners of the land adjoining have built on the lines established by the survey, the actual adverse possession of the land up to such lines for more than 15 years, without the claim of a right of easement therein by the railroad company, bars its right to possession of any portion of the land beyond such lines, though there was an error in such survey.—LOUISVILLE & N. R. CO. V. QUINN, Ky., 22 S. W. Rep. 221.

7. ALTERATION OF INSTRUMENT —Effect.—In foreclosure, the fact that the mortgage note on its face shows an alteration, so as to make it mature at an earlier date than originally written, is no ground for a judgment denying foreclosure, where the action was not brought until after the maturity of the note and mortgage as originally written, and its execution, and that of the mortgage for the consideration therein expressed, are admitted, and there is no evidence that the mortgagee was guilty of any fraud.—WOLFERMAN V. BELL, Wash., 32 Pac. Rep. 1017.

8. APPEAL — Reversal — Process.—Where one of defendants is not served with process in an action on a joint and several obligation, and judgment by default is taken against all the defendants, the judgment will be reversed as to the defendant not served, but it will be allowed to stand as to the other defendants.—WINDHAM V. NATIONAL FERTILIZER CO., Ala., 12 South. Rep. 872.

9. APPEARANCE—What Constitutes.—The filing of the general issue in an action, by his attorney, is an appearance by defendant.—SOLOMON V. TUPELO COMPRESS CO., Miss., 12 South. Rep. 850.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Assuming, without deciding, that under some circumstances, and in an action brought for that purpose against the beneficiaries of the trust, a deed of assignment for the benefit of creditors may be corrected and reformed, on the ground of mutality or mistake, so as to conform to the intentions of the immediate parties thereto, such correction and reformation cannot be had if it appears that the beneficiaries may have lost valuable rights, and will not be placed in *statu quo* in case the relief demanded is granted.—COTTRELL V. CITIZENS' SAV. BANK OF DETROIT, Minn., 54 N. W. Rep. 1111.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Two copartners made a conveyance of their property in trust for the payment of certain special debts. The instrument declared that after such payment "the residue shall be delivered, one half to each of the several parties, or the proceeds thereof expended for their several benefits, as they may, respectively, direct," and also stated that "the residue thereof, so divided, shall be paid to said [copartners] or any other creditor they, or either of them, may owe; reserving, however, to each of them, their respective and several exemptions:" Held, that the conveyance did not constitute a general assignment for the benefit of creditors.—HARSEIM v. BOOTH, Ind., 33 N. E.Rep. 1016.

12. ATTACHMENT BOND.—Where an attachment bond is executed to several, with a condition to pay them such damages as they may sustain by the wrongful suing out of an attachment, all the obligees may join in an action on the bond, though the attachment was levied on the individual property of only one of them. —SLOAN v. LANGERT, Wash., 32 Pac. Rep. 1015.

13. BONDS—Indorsement for Collection.—An indorsement of a draft to a bank "for collection," accompanied by a credit of the amount of the draft upon the indorser's account with the bank, does not transfer to the bank the legal title to such draft,and a correspondent of the bank, who collects the draft for it, is responsible therefor to the indorser.—TYSON v. WESTERN NAT. BANK, Md., 26 Atl. Rep. 520.

14. CARRIERS—Goods—Damages.—A person shipped goods at a certain through rate stated in the bill of lading, in care of himself. Afterwards the carrier agreed to deliver to the shipper at an intermediate point, provided the latter would pay the local rate. The local rate was contained in the carrier's published tariff, while the bill of lading was expressly stated as having been made subject to such tariff: Held, that the freight demanded was "shown by the bill of lading," within meaning of the statute, and that the carrier was therefore liable in damages for each day's retention of the goods after payment of the amount, or tender of payment.—ATCHISON, T. & S. F. R. CO. v. ROBERTS, Tex., 22 S. W. Rep. 183.

15. CARRIERS—Live-stock—Limiting Damages.—In an action by a shipper against a railroad company to recover the value of hogs killed in transit, under a contract releasing the company from liability for loss from overloading, heat, suffocation, fright, viciousness, or fire, and from all other damages incidental to railroad transportation, "which shall not be established by positive evidence to have been caused by the negligence of some officer or agent," plaintiff is entitled to a recovery where it does not appear from what cause the hogs died.—JOHNSTONE v. RICHARDSON & D. R. CO., S. Car., 17 S. E. Rep. 512.

16. CARRIERS—Passenger.—Under Rev. St. § 1818, providing that, if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him off at any usual stopping place or near any dwelling house, the ejection of a passenger for non-payment of fare, at a point three-fourths of a mile from any station or dwelling house, is unlawful.—PHETTIPLACE v. NORTHERN PAC. R. CO., Wis., 54 N. W. Rep. 1092.

17. CARRIERS OF PASSENGERS—Street-car.—Where a passenger of a street-car company is entitled to a transfer from one line to another, he is entitled to the same degree of care on the part of the company while making the transfer as is required of carriers of passengers, in guarding against injuries.—CITIZENS ST. R. CO. OF INDIANAPOLIS v. MERL, Ind., 33 N. E. Rep. 1015.

18. CHAMPERTY — Death by Wrongful Act.—An attorney suing as "administrator" to recover for a death by wrongful act, under Mill & V. Code Tenn. §§ 3130, 3134, may be guilty of a champertous agreement with the beneficiaries, which may be pleaded as a defense to the suit under sections 2445-2458, investing courts of law with equity powers for the purpose of discovering and preventing the offense.—BYRNE v. KANSAS CITY FT. S. & M. R. CO., U. S. C. C. (Tenn.), 55 Fed. Rep. 44.

19. CHATTEL MORTGAGE—Priority over Attachment.—Where a creditor attaches personal property covered by a mortgage, between the execution and delivery of the mortgage and the filing thereof, his lien is not superior to that of the mortgagee, under the statute (section 4379) declaring such mortgage void as to creditors unless filed, where the debt for which he attaches existed before the giving of the mortgage, and the creditor has not altered his position to his detriment since the mortgage was given, and before the filing thereof. —UNION NAT. BANK OF OSHKOSH v. OIUM, N. Dak., 54 N. W. Rep. 1034.

20. CONSTITUTIONAL LAW—Federal Taxation—Liens.—A State law requiring that all liens on real property must be recorded, in order to affect third parties, does not apply to tax liens in favor of the United States, and though such liens are not recorded, they may be enforced against the lands in the hands of purchasers for value without notice.—UNITED STATES v. SNYDER, U. S. S. C., 13 S. C. Rep. 843.

21. CONSTITUTIONAL LAW — Maritime Legislation — State Statutes.—The law administered in the admiralty courts of this country embraces not merely what is peculiar to the maritime law, but also much of the municipal local law, derived from the constituted order of the State, and all competent State and national legislation. What is peculiar to the maritime law, or that which by its interstate or international relations would be incompatible with diverse State legislation, can be changed by congress alone, which by implication, has the general power of legislation on the maritime law. This does not exclude State legislation upon maritime subjects of a local nature, nor legislation under the police power for the preservation of life or health, not incompatible with interstate and international interests, in the absence of legislation by congress. A State statute giving damages for death by negligence, as applied to a negligent collision on navigable waters within the State, does not infringe those conditions, and is valid.—THE CITY OF NORWALK, U. S. D. C. (N. Y.), 55 Fed. Rep. 98.

22. CONSTITUTIONAL LAW—Mechanics' Liens.—Const. art. 20, § 15, providing that mechanics, material men, etc., shall have a lien upon the property upon which they have bestowed labor or furnished material, etc., and the legislature shall provide by law for the speedy and efficient enforcement of such liens, is not self-executing, but requires legislation to give a lien.—SPINNEY v. GRIFFITH, Cal., 32 Pac. Rep. 974.

23. CONSTITUTIONAL LAW—Obligation of Contract.—A fire insurance company organized under a special charter before the adoption of the present constitution, is subject to such reasonable regulations as the legislature may prescribe by general law, and the public good may require; such regulations serving to secure the ends for which the company was created, and not being repugnant to the franchises and privileges granted in its charter.—STATE v. EAGLE INS. CO., Ohio, 33 N. E. Rep. 1056.

24. CONTRACT—Consideration.—A promise to forbear to sue on a debt for a specified time, based on a sufficient consideration, may be pleaded in bar to an action brought before the expiration of such time; and the debtor need not resort to a separate action for damages for breach of the promise, or plead his damages as a set-off in the original action.—STAVER & WALKER v. MISSIMER, Wash., 32 Pac. Rep. 995.

25. CONTRACTS—Performance.—In an action by a contractor for constructing a building, defendant cannot set-off damages for plaintiff's failure to complete the building within the time prescribed by the contract where such failure was due solely to its own negligence. —WHITE v. FRESNO NAT. BANK, Cal., 32 Pac. Rep. 979.

26. CONVERSION—Pleading.—Where a complaint alleges that defendants have collected a certain sum of money belonging to plaintiff, which they have converted to their own use, and which they have failed and refused

to pay over to plaintiff, the allegations are sufficient to show, not only a conversion, but also a demand.—SLOAN v. LICK CREEK & N. B. GRAVEL-ROAD CO., Ind., 33 N. E. Rep. 997.

27. CONVERSION—Pleading—Possession.—In an action by a mortgagee of personal property for conversion against a subsequent mortgagee of the same property, who has sold and bought in the property under his mortgage, a complaint which does not allege possession, or demand of possession fails to state a cause of action, since in Washington a chattel mortgage vests no title or right of possession in the mortgagee, and since his lien was not affected by the sale of the property under the subsequent mortgage.—BINNIAN v. BAKER, Wash., 32 Pac. Rep. 1008.

28. CORPORATION — Stockholders — Set-off.—The demands of stockholders individually cannot be interposed as equitable set-offs to a demand against the corporation, even though the plaintiff is insolvent.—GALLAGHER v. GERMANIA BREWING CO. (BARGE), Minn., 54 N. W. Rep. 1115

29. CORPORATIONS—Stockholders—Suits against Officers.—Stockholders cannot maintain a bill on behalf of a company charging its officers with misapplication and misappropriation of the funds of the company, and with violation of trust, unless the company has refused to bring such suit upon the express request of the stockholders.—WHITNEY v. FAIRBANKS, U. S. C. C. (Vt.), 54 Fed. Rep. 985.

30. COUNTIES — Defective Bridge.—In an action for personal injuries caused by a defective bridge, the county cannot escape liability because, after plaintiff had safely crossed the bridge, his horses became frightened while on the approach, and backed the buggy in which he and his wife were riding on the bridge again, and over the side, where there was no railing, since such use of the bridge is proper.—BOARD OF COM'RS v. SAPPENFIELD, Ind., 33 N. E. Rep. 1012.

31. COURTS—State Courts—Liens for Building Vessels.—The State courts have jurisdiction to enforce, by a proceeding *in rem*, liens given by its laws for materials furnished in constructing domestic vessels, notwithstanding Judicial Act 1789, § 9, giving the United States District Courts exclusive jurisdiction of all maritime causes of action, though such materials are furnished after the vessel is launched.—SMITH v. THE VICTORIAN, Oreg., 32 Pac. Rep. 1040.

32. COVENANT'S TO PAY ANOTHER'S DEBT.—Where the grantee of land covenants that as part of the consideration he will pay certain notes given by his grantor for deferred payments when he purchased the land, the payee, under the laws of Alabama, may proceed at law against the covenantor; and his so proceeding is such an acceptance of the covenant as draws to him the exclusive right of action thereon.—NORTH ALABAMA DEVELOPMENT CO. v. ORMAN, U. S. C. C. of App., 55 Fed. Rep. 18.

33. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—The facts that declarations, made by the victim of a murder under sense of impending death, were the result of questions prepounded by an attorney, the absence of cross-examination, the use of an interpreter, the presence only of friends and prosecuting officers, and that accused was unrepresented by counsel, are matters affecting merely the weight and credibility, and not the competency, of such declarations.—STATE v. FOOT YOU, Oreg., 32 Pac. Rep. 1031.

34. CRIMINAL LAW—Burglary.— Under 2 Hill's Code, p. 662, § 46, which defines burglarly as an unlawful entry, with intent to commit a felony, of an office, shop, store, etc., "or any building in which goods, merchandise, or valuable things or kept for use, sale, or deposit," burglary may be committed in any of the places particularly specified, and in any other building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit; and an indictment which charges the breaking and entry of an office is sufficient, without also charging that such office is a place where goods, merchandise, or valuable things are kept for sale or deposit.—STATE v. SUFFERIN, Wash., 32 Pac. Rep. 1021.

35. CRIMINAL LAW—Embezzlement.—Under St. 1887, p. 81, providing that any person to whom any money, property, or effects shall have been intrusted, who shall appropriate the same, or any part thereof, in any manner, or for any other purpose than that for which the same was intrusted, shall be guilty of embezzlement, an indictment need not allege that defendant appropriated the property willfully, feloniously, or with intent to steal, as the offense is complete when the appropriation is made, though he intended to afterwards replace the property taken.—STATE v. TROLSON, Nev., 32 Pac Rep. 930.

36. CRIMINAL LAW—False Pretenses.—Where a person sends out false business letter heads, reciting that he is a dealer in groceries, etc., by which a wholesaler is induced to send him goods on his order, such person is guilty of obtaining goods under false pretenses, within Gen. St. ch. 29, art. 13, § 2, providing that if any person, by any false statement or token, with intent to commit fraud, obtain from another property which may be stolen, he is guilty of a felony.—TAYLOR v. COMMONWEALTH, Ky., 22 S. W. Rep. 217.

37. CRIMINAL LAW—Joint Indictment.—That one of two parties jointly indicted is not ready for trial is not good ground for a severance on the application of the former; nor is the mere fact that one of the two will confess the alleged homicide as having been in self-defense on his part, whereas the other denies it to himself.—BALLARD v. STATE, Fla., 12 South. Rep. 865.

38. CRIMINAL LAW — Larceny — Ownership.—Where the legal owner of goods delivers them to another as bailee for safe-keeping, and the same are stolen from the possession of such bailee, the indictment charging the larceny thereof may lay the ownership either in the legal owner or in the bailee, or, in separate counts, may lay the ownership in both the legal owner and the bailee, at the option of the pleader.—KENNEDY v. STATE, Fla., 12 South. Rep. 858.

39. CRIMINAL LAW—Manslaughter.—Where a defendant is indicted for concealing the death of a bastard child, under Mansf. Dig. § 1543 providing that "every such mother shall suffer the same punishment as for manslaughter," it is error for the court to treat the indictment as charging the crime of manslaughter, and for the jury to return a verdict finding defendant guilty of voluntary manslaughter.—DUNN v. STATE, Ark., 22 S. W. Rep. 212.

40. CRIMINAL PRACTICE—Crime Committed in Adjoining County.—Under Code, § 4160, providing that when a public offense is committed on the boundary line of two or more counties, or within 500 yards thereof, the jurisdiction is within either county, an indictment for a crime committed in the adjoining county, within 500 yards of the boundary line, need not aver that no prosecution of the accused for the crime charged had been instituted in such adjoining county.—STATE v. NIERS, Iowa, 54 N. W. Rep. 1076.

41. CRIMINAL PRACTICE—Depositions.—Rev. St. 1881, § 1805, provides that the defendant in a criminal case "may, by leave of court, take the depositions of witnesses residing out of the State," upon consenting that the State may also take depositions, and that "the defendant may on the same terms, by leave of court, or by notice of the prosecuting attorney, take the deposition of any witness conditionally:" Held that, where notice has been given to the prosecuting attorney, the defendant in a criminal case may take the deposition of a witness in the State without obtaining leave of court.—TULLIS v. STAFFORD, Ind., 33 N. E. Rep. 1023.

42. DIVORCE—Lunacy as a Ground.—Lunacy is not a ground for divorce, though it prevents the wife from discharging her conjugal duties.—PILE v. PILE, Ky., 22 S. W. Rep. 215.

43. EJECTMENT—Deed.—In an action to recover certain land, where defendant's title is derived from a married woman, whose deed does not show that it was

made after her husband's death, and the pleadings are silent as to her *status*, and it is not conceded, it is proper to submit to the jury whether she "was a married woman at the time she made the deed, or a widow."—MARION V. AIKEN, S. Car., 17 S. E. Rep. 511.

44. EMINENT DOMAIN—Damages.—In estimating the damage caused to a farm by establishing a highway across it, the benefits which the owner will receive from the existence of a highway should be considered. —GOODWINE V. EVANS, Ind., 33 N. E. Rep. 1031.

45. EMINENT DOMAIN—Parties.—A judgment condemning lands for public use does not affect a lessee's right of possession when he is not made a party.—BALTIMORE & O. R. CO. V. FARRETTE, U. S. C. C. (Ohio), 55 Fed. Rep. 50.

46. EMINENT DOMAIN—Water Ditch—Electric Light Plant.—Const. art. 2, § 14, provides that private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches, on or across the lands of others, for milling purposes. Article 16, § 7, provides that all persons shall have the right of way across private lands for the construction of ditches, canals, and flumes for conveying water for manufacturing purposes: Held, that a person has a right to condemn a right of way over private lands for a ditch to carry water to operate an electric light plant.—LAMBORN V BELL, COLO., 32 Pac. Rep. 989.

47. ESTOPPEL—Deed of Married Woman.—Where there is a substantial conflict of evidence a finding on the issue to which it relates will not be set aside.—STOCKTON SAV. BANK V. STAPLES, Cal., 32 Pac. Rep. 936.

48. EVIDENCE—Certified Copy of Deed.—A certified copy of a deed recorded in Bexar county, and describing the land conveyed as "situated in the land districts of Milam and Bexar," is not admissible in evidence unless it is first shown that the land, or some part of it, was situated in Bexar county, or a county attached to it for registration purposes, or subsequently created out of it, so as to entitle the deed to record in that county.—LEAGUE V. THORP, Tex., 22 S. W. Rep. 178.

49. EVIDENCE—Consideration.—Where an instrument is silent on the subject of consideration, it is competent to prove by evidence *aliunde* that it was in fact executed for sufficient consideration.—TRUSTEES OF SEVENTH DAY BAPTIST MEMORIAL FUND V. SAUNDERS, Wis., 54 N. W. Rep. 1094.

50. EVIDENCE—Damages—Personal Injuries.—An engine belonging to defendant railroad company, and standing in its yard, exploded, and inflicted permanent injuries on plaintiff, who was in the service of another company, to which defendant had granted the right to use such yard. In his action for damages based on this injury, plaintiff was allowed to testify as to the wages received in the higher grades of the employment in which he was engaged, and to state that, had he remained in the service of the company, there was a chance or probability that he would be promoted, but it was not shown that there was any rule or recognized custom governing promotions that would have inured to plaintiff's benefit: Held, that the admissions of such evidence was reversible error; especially where the judge charged the jury that in estimating the damages they might consider the probability of plaintiff's promotion, if such were shown by the evidence.—RICHMOND & D. R. CO. V. ELLIOTT, U. S. C., 13 S. C. Rep. 837.

51. EXTRADITION—Fugitives from Justice.—Under Rev. St. § 5278, providing for interstate extradition, a person is a fugitive from justice when he has committed a crime within a State, and withdraws from the jurisdiction of its courts without waiting to abide the consequences, and it matters not that some other cause than a desire "to flee" induced such withdrawal. —IN RE WHITE, U. S. C. C. of App., 55 Fed. Rep. 54.

52. FEDERAL COURT—Circuit Courts—Jurisdiction.—When the original petition contains the proper averments, as to the citizenship of the parties, to bring the case within the jurisdiction of the United States circuit court, it cannot be objected that "the record fails to show the residence and citizenship of the parties at the time of the institution of the suit" simply because the averments as to these matters in an amended petition on which the case was tried refer to the time of its filing, and not to the time when the action was brought.—MEXICAN CENT. RY. CO. V. PINKNEY, U. S. S. C., 13 S. C. Rep. 859.

53. FEDERAL OFFENSE—Elections—Fraudulent Registration.—An indictment under Rev. St. § 5512, against a voter, for fraudulent registration, in falsely stating his place of residence, is fatally defective in failing to aver that such statement was made to the inspectors of election at the time of registration.—UNITED STATES V. JACQUES, U. S. C. C. (N. Y.), 55 Fed. Rep. 53.

54. FRAUDULENT CONVEYANCES—Possession.—The lessee of a dairy farm, who did not live thereon, sold his cows, fixtures, and equipments to an employee whom he had placed in charge of the farm; and a few months later, the employee being unable to pay, the property was resold to the lessee: Held that, if the jury is satisfied that the resale was honest, and for a valuable consideration, followed by acts intended to transfer the possession as well as the title, and that the lessee assumed such control of the property as reasonably indicate a change of ownership, the result is valid as against the employee's creditors, though the lessee continued him in charge of the farm and of the stock.—BELL V. MCCLOSKEY, Penn., 26 Atl. Rep. 547.

55. GUARDIAN AND WARD—Settlement.—A ward is competent, after he becomes of age, to settle with his guardian, and, if such settlement is honestly made, it will discharge the guardian and his sureties; but where the ward is fraudulently induced to take a worthless note and mortgage in settlement of his guardian's account, and the decree of the surrogate discharging the guardian, based on such settlement, is also obtained by fraud, the transactions have no effect on the rights of the ward, and he may repudiate them.—DOUGLASS V. FERRIS, N. Y., 33 N. E. Rep. 1041.

56. HOMESTEAD.—The fact that the owner of a farm selected as a homestead took cattle to pasture for hire, when he had more pasturage than was necessary for his own animals, and sometimes sold hay therefrom, does not vitiate the selection as a homestead, as being within the rule that property used for business purposes solely cannot be selected as a homestead.—KENNEDY V. GLOSTER, Cal., 32 Pac. Rep. 941.

57. HOMESTEAD—Sale under Execution.—Gen. St. § 1994, makes it the duty of a sheriff, before selling the real estate of any head of a family, to cause a homestead to be set off. Section 1998 declares that no right of homestead shall exist in any property aliened or mortgaged as against the claim of the alienee or mortgagee: Held that, where land is incumbered with mortgages, which allow the owner only a general unlocated right of homestead, dependent on there being a remainder after payment of the mortgages, a sale under execution, without causing the homestead to be set off, is not so wholly void as to make the purchaser a trespasser, and liable for the rents and profits. —BRADFORD V. BUCHANAN, S. Car., 17 S. E. Rep. 501.

58. HUSBAND AND WIFE—Agent.—Where a married woman authorizes her husband to sell a 99-year lease owned by her, and repeatedly ratifies his contract of sale, and the purchaser makes payments to the husband partly on the faith of the wife's representation that he is authorized to act for her, the purchaser on tendering the balance due, is entitled to an injunction restraining the prosecution of an ejectment suit brought by the wife for the leased land, and to a decree for the specific performance of the contract of sale.—FARRINGTON V. FORMAN, N. J., 26 Atl. Rep. 532.

59. INJUNCTION—Conflicting Affidavits.—Where a street railway obtains a preliminary injunction against the laying of tracks by another company on affidavits stating that the latter company has used fraud in procuring the consent of the authorities to its tracks, and

afterwards, on motion to continue, said company presents affidavits denying that it has used fraud, the injunction should be dissolved.—UNION ST. RY. CO. v. HAZLETON & N. S. ELECTRIC RY. CO., Penn., 26 Atl. Rep. 557.

60. INSANE PERSONS — Inquisition. — Where, subsequently to verdict and prior to sentence, doubts arise as to the sanity of the person convicted, the court has the right, upon the suggestion of the district attorney, to cause an investigation to be made on that subject.—IN RE CHANDLER, La., 12 South. Rep. 884.

61. INSOLVENCY—Statute—Repeal.—Act March 6, 1890, relating to assignments for the benefit of creditors, did not put an end to insolvency proceedings then pending, under provisions of the Code of 1881, relating to the same subject, although such provisions were thereby unqualifiedly repealed, and although no assignee in whom title to the debtor's property could vest had at the time been appointed. — EWING v. VAN WAGENEN, Wash., 32 Pac. Rep. 1009.

62. INTOXICATING LIQUORS.—It is no defense to a prosecution for selling intoxicating liquors that defendant did not know that they were intoxicating.—STATE v. LINDOEN, Iowa, 54 N. W. Rep. 1075.

63. INTOXICATING LIQUORS — Local Option — Illegal Sales.—One indicted for selling intoxicating liquors, which is an offense irrespective of the act of March 11, 1886, commonly known as the "Local-Option Law," cannot traverse an allegation that the act is in force in the locality, since the report of the election commissioners provided for in the act is conclusive on that point.—CONRAD v. STATE, Miss., 12 South. Rep. 851.

64. INTOXICATING LIQUORS — Sale at Club.—Without regard to trade or business, or to the fact that the proceeds are not realized with a view to profit, or for a livelihood, incorporated institutions, engaged in selling intoxicating liquors to their members, owe a license under the paragraph of section 11 of the license tax law, designating "sales, gifts, or other disposition" as subject to a license tax.—STATE v. BOSTON CLUB, La., 12 South. Rep. 895.

65. JUDGMENT BY DEFAULT — Estoppel. — Where a judgment has been entered on a note on which defendant made a declaration of no defense, and which he offered to pay the present holder before or about the time of its maturity, he is estopped fron availing himself of what would otherwise be grounds for opening the judgment. — HUMPHREY v. TOZIER, Penn., 26 Atl. Rep. 542.

66. JUDGMENT—Confession—Married Woman.—Under Act June 3, 1887 (P. L. 332), which enables a married woman to acquire property, and to contract in relation to her separate estate, as if she were a *feme sole*, a married woman's note, with power to confess judgment, for money borrowed for the benefit of her separate estate, is valid; and judgment by confession, entered thereon, binds her separate estate, though such judgment does not show the consideration and her direct liability on the face of the record. — MCCORMICK v. BOTTORF, Penn., 26 Atl. Rep. 545.

67. JUDGMENT — Excusable Neglect. — Under Hill's Ann. Laws, § 102, providing that the court may, in its discretion, relieve a party from a judgment taken against him through his mistake or excusable neglect, it may relieve him from a judgment entered against him for costs and disbursements through his excusable neglect in not filing objections to the cost bill within the time prescribed by law. — WEISS v. MEYER, Oreg., 32 Pac. Rep. 1025.

68. JUDGMENT — Vacation. — A decree declaring the rights of certain persons in an action is not vacated by a subsequent decree declaring the rights of such persons to be as stated in the former decree, except as to a person who has since intervened; and hence, the subsequent decree being itself afterwards vacated, the former is revived. — MASON v. MCLEAN, Wash., 32 Pac. Rep. 1006.

69. LANDLORD AND TENANT — Forfeiture of Lease.—The conditions found in a certain lease of real property, respecting the right of the landlord, at his election, to declare the same terminated, the leasehold interest forfeited, and to maintain an action to enter upon and take possession of the premises, considered and construed.—DOUGLAS v. HERMS, Minn., 54 N. W. Rep. 1112.

70. LIBEL — Pleading and Proof. — In an action for libel, charging plaintiff with being as "big a rascal" as one M, evidence is not admissible to show what kind of a rascal defendant charged M to be, in the absence of any allegation to that effect in the complaint.—CASSIDY v. BROOKLYN DAILY EAGLE, N. Y., 33 N. E. Rep. 1038.

71. LIFE INSURANCE — Statements in Application. — Statements by an applicant for a policy of life insurance concerning his physical condition, though not correct, will not avoid a policy issued him, where the statements were made in good faith, and such applicant had no reason to suspect, or means of ascertaining, that he was afflicted with a latent disease.—ENDOWMENT RANK, KNIGHTS OF PYTHIAS, v. ROSENFELD, Tenn., 22 S. W. Rep. 204.

72. MASTER AND SERVANT — Dangerous Premises.—Where a man is employed to shovel sand out of a pit which has such steep sides that they are liable to fall in at any moment, he cannot recover from his employer for injuries caused by the side of the pit falling in on him, since that is one of the usual risks and perils of his service.—SWANSON v. CITY OF LA FAYETTE, Ind., 33 N. E. Rep. 1033.

73. MASTER AND SERVANT — Defective Appliances.—A complaint in an action for damages alleged that plaintiff was employed in defendant's stone quarry in operating certain machinery for hoisting stones; that, on account of a pulley being broken, a cable passing over it became, on divers occasions, entangled in the machinery and boxing about the pulley; that at such times it was plaintiff's duty to extricate the cable, and replace it on the pulley; that, on the occasion in question, plaintiff attempted to extricate and readjust the cable; and that, while so doing, it became suddenly loose, and swung and vibrated violently, striking plaintiff: Held, that defendant could not escape liability on the ground that plaintiff was not hurt while operating the hoisting apparatus, but after it was stopped, and while attempting to fix it so that it could be operated; for the act of replacing the rope was, under the allegations of the complaint, a part of operating the machinery.—ROMONA OOLITIC STONE CO. v. JOHNSON, Ind., 33 N. E. Rep. 1000.

74. MASTER AND SERVANT—Injuries. — In an action by an employee against his employer for injuries caused by defects in the premises about which plaintiff was employed, where it appeared that the defect was known to defendant 24 hours before the injury, the question whether defendant had a reasonable time to repair the defect was one of fact. — MISSOURI PAC. RY. CO. v. SASSE, Tex., 22 S. W. Rep. 187.

75. MASTER AND SERVANT—Risks.—Where a minor is of sufficient age and discretion to comprehend the dangers of an employment, the fact that he is a minor cannot exercise a controlling influence.—EVANSVILLE & R. R. CO. v. HENDERSON, Ind., 33 N. E. Rep. 1021.

76. MASTER AND SERVANT—Negligence.—A yard boss, who has entire control of a mill yard, hires and discharges workmen, and superintends the piling of lumber, is not a fellow-servant of such workmen, but represents the master; and the master is liable for the death of one of such workmen, killed by the falling of lumber negligently piled under the direction of the yard boss.—ZINTEK v. STIMSON MILL CO., Wash., 32 Pac. Rep. 997.

77. MECHANIC'S LIEN — Enlargement of Statute. — A provision in a contract between the owner and the contractor, that "all money for brick work and materials should be paid by individual checks to parties furnishing the same," does not entitle a company furnishing brick to a subcontractor, and used in the building erected under such contract, to a mechanic's

lien on such building therefor, since parties cannot enlarge the statute by contract, if such is the intent.—LOWENSTEIN V. REYNOLDS, Tenn., 22 S. W. Rep 210.

78. MECHANIC'S LIEN — Limitation. — In an action to foreclose a mechanic's lien, the fact that it was not commenced within one year after the date of the plaintiff's last item, by reason of which he cannot recover, will not prevent a recovery by a lien-claiming defendant, whose answer is filed within a year after the date of his last item. — SANDBERG V. PALM, Minn., 54 N. W. Rep. 1109.

79. MECHANIC'S LIEN — Severable Contract.—Plaintiff agreed to sell defendant a vacant lot, and to build her a house thereon. Both agreements were written on the same paper, but the consideration for each was separate, and payable at different times. Plaintiff built the house, and then gave defendant a deed of the property: Held that, as the agreements were severable, the plaintiff was entitled to a mechanic's lien on the property for the amount due him for building the house.—FULLMER V. POUST, Penn., 26 Atl. Rep. 543.

80. MINES—Agricultural Lands.—A location of a mine is not invalid, as against a subsequent location, because a portion thereof was made on agricultural land, which was afterwards patented, where the agricultural land could be profitable worked only by commencing on the other portion of the location, and the money expended on such other portion was sufficient to make a valid location of the whole, the subsequent locator not connecting his claim with the holders of the agricultural patent.—RICHARD V. WOLFLING, Cal., 32 Pac. Rep. 971.

81. MINES AND MINING—Patents—Right to Follow Dip. —The patentee, and even the mere possessor, of a mining claim, under license from the government, has a right to all minerals lying vertically beneath the surface of his claim, subject only to the right of the lawful possessor of a neighboring claim having parallel end lines to follow any lode, the apex of which lies within his claim, on its dip within the limits of infinite planes vertically projected through such end lines. An unlawful possessor has no such right to follow the dip.—DOE V. WATERLOO MIN. CO., U. S. C. C. (Cal.), 54 Fed. Rep. 935.

82. MONOPOLIES—Indictment—Conspiracy.—St. U. S. 1890, ch. 647, declares illegal contracts, combinations, or conspiracies in restraint of trade, and makes it a misdemeanor for any person to make or engage in them, or to monopolize, or attempt or conspire with others to monopolize, any part of the trade or commerce among the several States or with foreign nations: Held, that in an indictment under this chapter it is not sufficient to declare in the words of the statute, but the means whereby it is sought to monopolize the market must be set out, so as to enable the court to see that they are illegal.—UNITED STATES V. PATTERSON, U. S. C. C. (Mass.), 54 Fed. Rep. 1005.

83. MORTGAGE FORECLOSURE — Unlawful Consideration.—On a mortgage foreclosure the evidence showed that, at the time the note and mortgage were given, there was pending, in insolvency proceedings against defendants' father, the latter's petition for discharge and plaintiff's opposition thereto; that the consideration of the note, though not expressed therein, was an assignment to defendants by plaintiff of his claim against the insolvent, which was of the same amount as the note, and that the estimated value of the claim was one-sixth of its face; that by agreement plaintiff's claim against the insolvent assigned to defendant was to be held by plaintiff's attorney, and, when paid, to be applied on the note; that after the giving of the note and mortgage, plaintiff's opposition to the discharge of the insolvent was withdrawn: Held, that the mortgage and note were void as against public policy.—BENICIA AGRICULTURAL WORKS V. ESTES, Cal., 32 Pac. Rep. 938.

84. MORTGAGES—Recording.—Act March 18, 1775, § 1, provides that every deed and conveyance which shall not be recorded within six months after execution shall be void against any subsequent purchaser or mortgagee unless recorded before the recording of the deed under which such subsequent purchaser or mortgagee shall claim: Held, that a mortgage actually recorded before a deed of the same premises is recorded has priority over the deed, though the deed was recorded within six months from its execution and the mortgage was not.—FRIES V. NULL, Penn., 26 Atl. Rep. 554.

85. MUNICIPAL CORPORATIONS — Contract.—A resolution adopted by the council of a municipal corporation, authorizing and directing its mayor to enter into a contract with a third person, when not acted on by the mayor, and when no contract is made, does not of itself create a contract.—CITY OF BALTIMORE V. CITY OF NEW ORLEANS, La., 12 South. Rep. 978.

86. MUNICIPAL CORPORATIONS—Contract—Ultra Vires. —An action will not lie against a city for breach of contract, by the terms of which it agrees to keep in repair a ditch constructed by it through plaintiff's land lying outside of the corporate limits, for the purpose of drainage of certain lands within such city, since such contract is *ultra vires*.—HAMILTON V. CITY OF SHELBYVILLE, Ind., 33 N. E. Rep. 107.

87. NEGLIGENCE—Defective Highways.—In an action against a county to recover for injuries sustained by being thrown from a buggy by a patent defect in the highway, where it appeared that plaintiff deliberately and carelessly, seeing the defect, drove over it, or that her failure to see it was the proximate cause of injury, she cannot recover.—MAGILL V. LANCASTER COUNTY, S. Car., 17 S. E. Rep. 507.

88. NEGLIGENCE — Horses Running Away.—Horses hired by plaintiff to defendant ice company became frightened and unmanageable while on the ice, and ran onto thin ice, and were drowned: Held, that defendant's failure to place a fence of a single board, nailed on 2 by 4 inch posts 3½ feet from the surface on which the posts stand, in accordance with Sanb. & B. Ann. St. § 4395, was not such negligence as would warrant a recovery for the horses, since such a fence would have been totally inadequate to prevent the accident.—STACY V. KNICKEROCKER ICE CO., Wis., 54 N. W. Rep. 1091.

89. NEGOTIABLE INSTRUMENT—Indorsement of Note. —An indorser of a note is not a surety, within Mansf. Dig. §§ 6396, 6397, authorizing a surety to maintain an action against his principal to obtain indemnity against the liability for which he is bound, before it is due, whenever any grounds for attachment exist, and in such actions to obtain orders of attachment.—RICE V. DORRIAN, Ark., 22 S. W. Rep. 213.

90. NEGOTIABLE INSTRUMENT—Note—Liability of Indorsers.—In an action by the indorsee of a note against the maker and two indorsers, it appeared that, before the note was delivered to the payee, the maker procured the other defendants to indorse it as further security, to enable the payee to raise money on it; and that, when the payee indorsed it to plaintiff, he inadvertently wrote his name above the names of the two other indorsers, with the words "without recourse" above his name: Held, that such indorsers were liable on the note as makers, without demand on the maker, and notice of non-payment and protest.—BANK OF JAMACIA V. JEFFERSON, Tenn., 22 S. W. Rep. 211.

91. NOTARY PUBLIC—Women.—Mill. & V. Code, § 936, provides that all males of the age of 21 years, etc., are qualified to hold office. Section 48 provides that words used in the statutes, importing the masculine gender, includes the feminine and neuter: Held, that such statutes cannot be construed as giving the women the right to hold office, and that, in the absence of a constitutional provision or special enabling act, a woman is not eligible to hold the office of notary public.—STATE V. DAVIDSON, Tenn., 22 S. W. Rep. 203.

92. PARTIES — Substitution.—Judgment was had against the receiver of a railroad company, and pend-

ing a writ of error the receiver was discharged, and thereafter died. In accordance with written stipulation of counsel the railroad company was substituted, this change "not to affect any of the questions or controversies presented by the record," and the judgment was subsequently affirmed: Held, that the trial court, upon the remand of the cause, should issue execution directly against the company.—TEXAS & P. RY. CO. v. ANDERSON, U. S. S. C. 13 S. C. Rep. 843.

93. PARTNERSHIP ACCOUNTING—Award on Arbitration.—Where two partners submitted to arbitration issues as to the profits and losses of the firm, the share of each in the partnership property and other profits, if any, such issues to be decided from the partnership books, so that either partner might purchase the interest of the other by paying him its value, an award undertaking to state an account between them, and deciding that the business was conducted at a loss,—a conclusion derived from stating the account,—is not consonant with the submission, and is no bar to an action by one partner against the other for a dissolution and accounting.—GARROW v. NICOLAI, Oreg., 32 Pac. Rep. 1036.

94. PARTNERSHIP—Note given by One Partner.—The payee of notes given by one partner for the price of land cannot maintain an action against the maker's partner to recover the amount thereof on the ground that he was an undisclosed partner, though the land was purchased for the partnership, where the payee had full knowledge of the partnership relation, but accepted the notes, secured by a mortgage on the land, "in full payment of the purchase price."—USHER v. WADDINGHAM, Conn., 26 Atl. Rep. 538.

95. PAYMENT—Taking Negotiable Paper.—The acceptance of a negotiable note governed by the law merchant, executed either by the debtor or some third person, is presumptively an extinguishment of the debt; and where, in an action on account, it appeared that plaintiffs had taken a note therefor, and that there was no agreement that the note should or should not be taken as payment, the presumption that it was accepted as payment must prevail.—MASON v. DOUGLASS, Ind., 33 N. E. Rep. 1009.

96. PLEDGE—Conversion.—On borrowing money from a bank, the borrower deposited stock as collateral security, and gave a demand note providing that if he should come under any other liability, or enter into any other engagement, with said bank, the net proceeds of the sale of the pledged stock should be applied, either on this note, or any of his other liabilities: Held, that only future liabilities were contemplated by the parties, and that the stock could not be held as security for a responsibility which had accrued nearly five months before making the pledge.—PRESIDENT & DIRECTORS OF FRANKLIN BANK v. HARRIS, Md., 26 Atl. Rep. 523.

97. PUBLIC LANDS—Cutting Timber.—In an action of trespass brought by the United States to recover for timber cut from the public lands, where it clearly appears that defendant cut some trees from the land in question, sawed them into lumber, and sold the same for eight or nine dollars per thousand feet, the government is entitled, at least, to a verdict for nominal damages, although there is no evidence as to the value of the standing trees.—UNITED STATES v. MOCK, U. S. S. C., 13 S. C. Rep. 848.

98. PUBLIC LANDS—Decisions of the Land Office.—Decisions by the secretary of the interior and his subordinates on questions of fact arising in the administration of the land office are conclusive upon the courts when made in the performance of their official duties, no fraud being shown; but such decisions, to be valid, must be made according to the usual and regular rules of practice in the department, and must be based on legal evidence, or upon some formal inquiry or trial at which the parties have a fair opportunity of presenting evidence to support the claims or rights which they assert.—PUGET MILL CO. v. BROWN, U. S. C. C. (Wash.), 54 Fed. Rep. 987.

99. QUO WARRANTO—Corporations.—The object of a proceeding in *quo warranto* against a corporation is to determine its right to the exercise of any or all of the franchises it may claim the right to use and possess, not to divest it of the ownership of property, unless acquired by a usurpation of the proprietary rights of the State.—STATE v. PITTSBURG, Y. & A. R. CO., Ohio, 33 N. E. Rep. 1051.

100. RAILROAD COMPANY — Street Car Companies — Negligence.—In an action for injuries sustained by being run over by a street car, evidence that plaintiff, a cripple, stopped to look and listen for a car before crossing the street, that she saw no car approaching, and that the one which struck her came round a curve, and passed over the intervening space to the place of the accident within a minute, warrants the jury in finding that plaintiff was not guilty of contributory negligence, since one minute may not be a sufficient time to enable a cripple, who had started to cross the street, to get out of the way of an approaching car.—BALTIMORE TRACTION CO. v. WALLACE, Md., 26 Atl. Rep. 518.

101. RAILROAD COMPANY—Street-Car — Negligence.—Owing to a washout, a city constructed a temporary roadway, about 120 feet long, near a street car track, and persons driving along the street were compelled to cross the street-car track when they reached the temporary roadway, and again when they left it: Held, that a driver of a wagon who, with full knowledge of the dangerous character of the place, crossed the car tracks onto the temporary roadway without looking for an approaching car, which struck him as he was attempting to cross back at the end of the temporary roadway, was guilty of contributory negligencer and could not recover from the street-car company.—CHRISTENSEN v. UNION TRUNK LINE, Wash., 32 Pac. Rep. 1018.

102. RAILROAD COMPANY—Street Railroads.—Where a boy attempts to get on the front platform of a horse car, which has stopped to let off a passenger, without giving any indication to either the driver or conductor of his intention to become a passenger, and is not seen by either of them, the street-railway company is not liable for injuries to such boy, caused by starting the car, in the ordinary manner, just at the time of making such attempt.—PITCHER v. PEOPLE'S ST. RY. CO. OF LUZERNE COUNTY, Penn., 26 Atl. Rep. 559.

103. REAL ESTATE BROKERS—Power.—A contract by a real estate agent, whereby his principal is to convey land to the purchaser upon payment of a part of the price in cash and the balance within 20 days, is not within the terms of a contract whereby the agent is authorized to procure cash purchasers, and the deeds are to be executed by a third person, to whom the principal has given a power of attorney.—RUNDLE v. CUTTING, Colo., 32 Pac. Rep. 994.

104. REMOVAL OF CAUSES—Alien Plaintiffs.—Under the judiciary act of 1887, as corrected by the act of August 13; 1888 (25 St. p. 433), a suit brought by alien plaintiffs against corporation defendants not chartered by the State in which suit is brought may be removed to the federal court by such defendants.—SHERWOOD v. NEWPORT NEWS & M. VAL. CO., U. S. C. C. (Tenn), 55 Fed. Rep. 1.

105. REPLEVIN.—Where the property replevied has been restored to defendant on bond, the burning of the property did not operate as a lease from liability, though such loss was beyond her control, and without her fault.—GEORGE v. HEWLETTE, Miss., 12 South. Rep. 855.

106. RES JUDICATA.—One A brought an action of replevin against B, which was dismissed, because A had a legal capacity to sue: Held, that the judgment of dismissal for the cause stated did not bar a future action for the same property.—RODGERS v. LEVY, Neb., 54 N. W. Rep. 1080.

107. SALE—Conditional Sales.—The vendor of personal property under a conditional sale, whereby title is reserved in himself until the notes given therefor

are paid, may replevin the property to secure the debt, though he has indorsed the notes to third parties who are suing the vendee thereon, but on a recovery he must apply the money realized to the payment of the debt. — MCPHERSON V. ACME LUMBER CO., Miss., 12 South. Rep. 857.

108. SALE — Warranty. — Plaintiffs, through their agent, sold a stallion to defendant, and gave him a written warranty that the horse was an average foal getter. The evidence showed that at the time the horse was sold he was affected with a disease from which he soon afterwards died, and which rendered him entirely unable to perform the service for which he was warranted. It was also proved that the agent knew of the disease, and about a month before the sale was treating the horse for it. The condition of the horse was noticeable on an ordinary examination when defendant took him: Held, that plaintiff could not recover the price of the horse.—RAESIDE V. HAMM, Iowa, 54 N. W. Rep. 1079.

109. STARE DECISIS— Overruling Decisions.— Wherever the construction of a statute has been repeatedly given in the same way, or where a construction has been given and acquiesced in for a number of years, it would be manifestly improper for a court to disturb questions thus settled.—HARVEY V. TRAVELERS' INS. CO., Colo., 32 Pac. Rep. 935.

110. SPECIFIC PERFORMANCE—Mutuality of Contract. —A lease for years, at a specified yearly rental, recited that the lessors agreed to sell the land to the lessee, at any time before expiration of the lease, for $2,500, and the lessee agreed that, if he failed to purchase the land before the expiration of the lease, he should forfeit all rights to any improvements made thereon. It appeared that the lessee had occupied the premises for five years under a prior lease, at the same rental and had put certain improvements thereon which he threatened to remove if he did not obtain a renewal, and that he would not have taken such renewal except for the option to purchase: Held, that there was sufficient consideration for the option, and specific performance should not be denied for want of mutuality in the contract.— HOUSE V. JACKSON, Oreg., 32 Pac. Rep. 1027.

111. SPECIFIC PERFORMANCE—Sale in Gross.—Where a contract for the sale of land states that the tract contains 282 acres, and that the sale is made in gross, and not by the acre, the vendors are not entitled to specific performance, though it appears on a survey ordered by the court that there is a deficiency of 7 acres and 18 poles in the tract.—FARRIS V. HUGHES, Va., 17 S. E. Rep. 518.

121. TAXATION— Sale— Presumption.— A list of lands sold to the State for taxes will be regarded as certified in conformity to law, and as evidence of title in the State, where it appears to have been authenticated as such list by the official signature of the tax collector.—COLE V. COON, Miss., 12 South. Rep. 849.

113. TENANCY IN COMMON—Lease to Co-tenant.— Where one co-tenant of real estate rents his share to the other for a term at a specified rent, and the latter remains in exclusive possession after the term, he will be held to do so in his character of tenant, and the same rule as to rent will apply as in case of any tenant holding over.—O'CONNOR V. DELANEY, Minn., 54 N. W. Rep. 1108.

114. TENANCY IN COMMON—Partition.—Where two persons contract to maintain and cultivate an olive ranch, contemplating, not a division of the property, but its building up, operation, and sale as a whole, but making no distinct or specific agreement to that effect, one party may enforce a division, under Code Civil Proc. Cal. § 763, providing that the court must order a partition "unless the property is so situated that partition cannot be made without prejudice to the owners;" and the fact that defendant is a lawyer practicing in a distant State, having no knowledge of farming or olive culture, and that plaintiff would be unable to buy in the property if it should be sold as a whole, are unimportant in the determination of the question, for the situation of the property, not the circumstances of the parties, must control.—HAYNE V. GOULD, U. S. C. C. (Cal.), 54 Fed. Rep. 951.

115. TRIAL — Instructions — Preponderance of Evidence.—An instruction that in determining the preponderance of the evidence the jury "should," in connection with the number of witnesses on any proposition, take into consideration their opportunity for knowing the things about which they testify, the probability of the truth of their several statements, in view of all the other evidence was not erroneous on account of the use of the word "should" instead of "may," as it did not cast discredit on any particular witness or class of witnesses.—ROBERTSON V. MONROE, Ind., 33 N. E. Rep. 1002.

116. TRUSTS—Purchase of Trust Estate.—Where a person purchases the trust estate for the benefit of the *cestui que trust*, having actual knowledge of an existing decree of a competent court that the trustee conveyed to the *cestui que trust* on being reimbursed for his expenditures in administering the trust, the purchaser stands in the shoes of the original trustee, and cannot incorporate in his deed to the beneficiary a condition not warranted by the original trust.—SECOND UNITARIAN SOC. V. GRANT, U. S. C. C. (Me.), 55 Fed. Rep. 22.

117. USURY—Evidence.—Where usury is alleged as a defense to an obligation to pay money, the presumption is against the violation of the law, and in favor of the innocence of the party charged, and the usury must be established by clear and satisfactory evidence.—WHITE V. BENJAMIN, N. Y., 33 N. E. Rep. 1037.

118. WATERS — Riparian Rights — Alluvion.—On an issue as to whether the addition to land on the north side of a river was the result of alluvion or avulsion, it appeared that such river was subject to annual rises in the spring and summer of each year. The bank on the south side of the river was higher than on the north side, and during each rise the bank on the south side would cave in, and wash away, and the channel move towards the south side after each rise. Land would form on the north side after each rise. Some years the changes resulting from the rise of the river were greater than during other years, and occasionally the change made by the force of the current could be noticed while it was going on: Held, that the increase was caused by alluvion, and was not the result of sudden changes.—DENNY V. COTTON, Tex., 22 S. W. Rep. 122.

119. WATERS—Surface Water—Easement of Flowage. —The owner of the lower or servient land must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land.—GRAY V. MCWILLIAMS, Cal., 32 Pac. Rep. 976.

120. WILLS— Description of Devisee.— Testator made a devise to an unmarried daughter, without words of limitation or purchase. To a married daughter, "and her lineage," he gave certain land and for a son and his children he left in trust certain other land, providing that on the death of the son, it should be divided between his children: Held, that the term "lineage" was used in the sense of "heirs," and as simply a word of limitation, so that the married daughter took a fee in the entire property given her.—LOCKETT V. LOCKETT, Ky., 22 S. W. Rep. 224.

121. WILLS— Revocation—Gifts.—Testator, after advancing to his children more than their shares of his property, devised his remaining land to the children of his deceased son. Thereafter he sold the land, stating that the boys (his grandchildren) could divide the money and they could not divide the land, and he would use some of the money and give them the balance. The note for the purchase money, a part of which was paid in his life-time, was placed by him in the hands of one of the grandchildren, where it was at the time of his death. Held that, though the will was revoked as to the land, and as to the note he died intestate, he had given it to his grandchildren.—CLINTON V. MCKEOWN, S. Car., 17 S. E. Rep. 504.

## ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

### KANSAS CITY COURT OF APPEALS.

AGENCY—Unauthorized Act—Ratification.—Where an agent, having authority to borrow money, or execute notes, in his principal's name, falsely represents that he has such authority and does execute such a note and borrow on it money, which he turns over, in payment of his indebtedness, to his principal, the principal must, after becoming aware of all the facts, either return the money so received, or pay the note. A party cannot, under such circumstances, repudiate that part of an unauthorized act of an agent which is unfavorable to him, and adopt that part which is favorable.—FIRST NAT'L BANK OF TRENTON v. THE BADGER LUMBER CO.

BILL OF LADING — Transfer—Title to Goods.—The transfer of a bill of lading to a bank, as collateral security for advances made upon the faith of the transfer, is a pledge of the goods themselves, unless a different intention appears. The *bona fide* holder of such bill of lading, has a title to the goods which is paramount to the unpaid vendor's right of stoppage *in transitu;* but, when the bill of lading is taken as collateral security for, or in payment of, antecedent indebtedness, the holder acquires no such title to the goods as cuts off the vendor's right of stoppage, and this, though such bill have stamped across its face the words, "not negotiable," for the object of these words is not to affect the transfer of the bill of lading, or give notice of any infirmity in the shipper's title to the goods, but to notify the shipper himself that the bill of lading is not subject to the operation of chapter 18, Rev. St. 1889.—DYMOCK v. M., K & T. RY. CO.

CITY ORDINANCE—Construction of.—Where an ordinance for the construction of district sewers provides that the sewer first described shall be made of vitrified clay pipe, and that the other sewers to be constructed shall be "pipe sewers," that construction which presumes that the council never intended to pass an ordinance incapable of a sensible and practical operation will be adopted, and the words "vitrified clay" will be implied, whenever needed in the ordinance, to give effect to the intent of the council that all of said sewers should be made of vitrified clay pipe.—CITY OF ST. JOSEPH TO USE v. LAUDES.

CONTRACT — Rescission — Lien for Attorney's Fee.—Plaintiff sought to annul a contract of settlement of a suit, on the ground that it was obtained from her by fraud and deceit, and in violation of the rights of her attorneys: Held, the contract was voidable and not void, and in such cases the return of, or offer to, return, the consideration is a prerequisite to the right to annul; that an attorney has no lien for his services upon a judgment obtained by him, and can, therefore, have none on the claim before it is reduced to judgment, in the absence of statute conferring such lien.—ALEXANDER v. THE GRAND AVE. RY. CO.

DAMAGES — Permanent Injury—Pleading.—In an action for personal injuries, the petition need not, in specific terms, allege permanent injuries in order to allow a recovery of damages for permanent injury. It is sufficient if it appear from the whole petition, fairly construed, that such injuries are covered by its allegations.—LEWIS v. CITY OF INDEPENDENCE.

MECHANIC'S LIEN— Partiesto Action.—Under section 6713, Rev. St. 1889, the party seeking to enforce a mechanic's lien may make holders of incumbrances parties to the suit, or not, at his option. If not made parties, they are not bound by the proceedings, but the proceedings are valid nevertheless.—THE BADGER LUMBER CO. v. BALETINE.

MISDEMEANOR — Work on Sunday. — A barber who works in his shop at his trade, on Sunday, is guilty of a misdemeanor under Sec. 3852, Rev. St. 1889. Such work does not come within the exceptions of that statute as a work of necessity.—STATE v. WELLCOTT.

PLEADING—Evidence.—Where, in an action for purchase price, the petition charged that chattels were sold by plaintiff to defendant, the defendant may, under a general denial, prove that the chattels were a gift. Proof of a gift is a legitimate mode of disproving the allegation of a sale, and supports a general denial.—BLUTZ v. LESTER.

PRACTICE—Motion for a New Trial—Appeal. — Under the act of 1891 (Sess. Acts, 1891, p. 70), the party aggrieved may appeal from an order granting a new trial, and the effect of such appeal, unless waived, is to suspend further proceedings in the cause until the appeal is disposed of; but, by participating in the new trial, pending such appeal, he waives his right to complain of errors committed in the first trial.—TRUNDLE v. PROVIDENCE-WASHINGTON INS. CO.

PROMISSORY NOTE — Consideration. — A promissory note made by a party in settlement of another note on which he believes he is liable as a surety, when in fact he is not, is without consideration, and it is of no consequence whether the belief was caused by fraudulent or innocent representations, or no representations, at all.—WRIGHT v. VETTER.

PROMISSORY NOTE — Indorsement — Payment.— A syndicate composed of defendant and others, bought of plaintiff land which was conveyed to defendant, who held title in trust for the syndicate, and gave his notes to plaintiff for unpaid purchase money. Afterwards defendant sold and conveyed his interest to H and C, two of his co-purchasers and also conveyed to them the interest he held in trust for them, and they assumed and agreed to pay the notes, and did pay to plaintiff the first note when it matured. Before the second note matured, plaintiff went to H and C and offered to discount it, and on payment of note, less the discount, indorsed it to them. Afterwards H and C sued plaintiff as indorser on note and recovered. Plaintiff paid same and sued defendant on note: Held, the payment of the judgment by plaintiff vested the title to the note in him, by operation of law, with right to recover from defendant as maker.—SHARP v. GARNETT.

RAILROAD—Personal Injury—Negligence.—A railroad company, assuming to carry passengers for hire upon a freight train, is required to exercise that degree of care required in the operation of a regular passenger train; the difference being, that the passenger on a freight train submits himself to the inconvenience and danger necessarily attending that mode of conveyance, and for an injury resulting therefrom the law affords no indemnity.—GUFFEY v. THE H. & ST. JOE RY. CO.

RAILWAY—Freight Contract — Negligence. — A party who signs and accepts a written contract for shipment of cattle, without protest and without any other apparent reason than as a substitute for a prior verbal contract therefor, at a time when he might have refused to sign, or withdrawn his cattle, must be deemed to have agreed to the annulment of the oral contract. A provision in such written contract, that the parties agreed that schedule time and 12 hours additional should be considered reasonable time, relieves the carrier from the strictness of the rule with which the common law binds it, but will not relieve it of any act of negligence. It is a contract to deliver the cattle not in a specified time but in a reasonable time, and will be construed in the light of surrounding circumstances, and will not be allowed to shelter and protect negligence.—LEONARD v. C. & A. RY. CO.

SURETY—Contract—Discharge. — When an employee who enters into a contract with his employer and gives bond with sureties for its faithful performance, is afterwards by the employer expressly relieved of the necessity of performing certain conditions of his contract which tend to secure the employer, the sureties are thereby discharged from all liability.—BURLEY v. HILT.